(8)

No. 99-1238-CFH Title: Christopher Artuz, Superintendent, Green Haven Correctional Facility, Petitioner
v.
Tony Bruce Bennett

Docketed:
January 26, 2000 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Jan 24 2000	Petition for writ of certiorari filed. (Response due February 25, 2000)
	Feb 8 2000	Waiver of right of respondent Tony B. Bennett to respond filed.
	Feb 9 2000	DISTRIBUTED for Conference of February 25, 2000
	Feb 18 2000	Response requested.
	Mar 16 2000	Brief of respondent Tony B. Bennett in opposition filed.
	Mar 16 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Mar 29 2000	REDISTRIBUTED for Conference of April 14, 2000
	Apr 17 2000	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Apr 17 2000	Petition GRANTED. SET FOR ARGUMENT October 10, 2000. **********
	May 31 2000	Order extending time to file brief of petitioner on the merits until June 22, 2000.
	Jun 22 2000	Joint appendix filed.
	Jun 22 2000	Brief of petitioner Christopher Artuz filed.
	Jun 22 2000	Brief amici curiae of Florida, et al. filed.
	Jul 26 2000	CIRCULATED.
	Jul 31 2000	Motion of Florida for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 11 2000	Brief of respondent Tony B. Bennett filed.
	Aug 28 2000	Motion of Florida for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Sep 11 2000	Reply brief of petitioner Christopher Artuz, Superintendent filed.
	Sep 13 2000	Record filed.
	Sep 20 2000	Record filed.
	Oct 10 2000	ARGUED.

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No. __-____

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

TONY BRUCE BENNETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 24, 2000

QUESTION PRESENTED

Is a state court post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions in the Anti-Terrorism and Effective Death Penalty Act of 1996, if it is filed in a court that does not have the power to hear the merits of the application?

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NO. __-__

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

v.

TONY BRUCE BENNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Christopher Artuz, Superintendent of the Greenhaven Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on October 25, 1999, reversing the case and remanding to the district court for further proceedings in accordance with its opinion. The petitioner is represented in this proceeding by the District Attorney of

Queens County, New York, by agreement with the Attorney General of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at No. 98-2452, 1999 U.S. App. LEXIS 26814 (2d Cir. Oct. 25, 1999) (Winter, Kearse, and McLaughlin, JJ.). The decision is reprinted in the appendix of this petition at p. 4a, infra.

The order of the United States District Court for the Eastern District of New York (Gershon, J.) has not been reported. It is reprinted in the appendix at p. 1a, infra.

The decision of the New York State Court of Appeals denying respondent Tony Bruce Bennett's application for leave to appeal to that court from the decision of the Appellate Division, Second Department is reported at 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987). The decision of the Appellate Division, Second Department, unanimously affirming the judgment is reported at 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987).

JURISDICTION

This petition for a writ of habeas corpus was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On February 25, 1998, the Eastern District dismissed the petition for a writ of habeas corpus. Pet. App. at 1a.

On October 25, 1999, the Second Circuit entered a judgment and opinion reversing that order and remanding the case to the district court with directions to proceed in

accordance with the opinion of the Second Circuit. Pet. App. at 4a.

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 13. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d)(2) of Title 28 of the United States Code provides:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Section 440.10(2) of the New York Criminal Procedure Law provides:

> Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:
>
> (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively

effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him;

(d) The ground or issue raised relates solely to the validity of the sentence and not the validity of the conviction.

N.Y. Crim. Proc. Law § 440.10(2).

STATEMENT OF THE CASE

Crime And Trial

On the morning of February 1, 1983, in Queens County, New York, the police pursued Bennett and his co-defendant as they rode in a stolen car. During the pursuit,

Bennett leaned out of the back seat of the car and twice fired his pistol in the direction of the police car, striking it both times in the hood.

At trial, a jury convicted Bennett on March 28, 1984 of two counts of Attempted Murder in the First Degree, Criminal Possession of a Weapon in the Second Degree, two counts of Reckless Endangerment in the First Degree, Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Motor Vehicle.

On September 25, 1984, Bennett was sentenced to concurrent indeterminate prison terms of from fifteen years to life on the attempted murder counts and to lesser terms on the remaining counts, to run concurrently with the greater terms.

Direct Appeal

On direct appeal to the Supreme Court of the State of New York. Appellate Division, Bennett argued, among other things, that the trial court had deprived him of a fair trial by refusing to allow a defense witness to testify.

On March 2, 1987, the Appellate Division unanimously affirmed the judgment of conviction. See People v. Bennett, 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987).

On March 19, 1987, Bennett sought leave to appeal to the New York State Court of Appeals. On May 7, 1987, that application was denied. See People v. Bennett, 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987).

Post-Conviction Applications

Four years later, on August 16, 1991, Bennett, through privately retained counsel, moved in the state trial court to vacate the judgment pursuant to Section 440.10 of the New York Criminal Procedure Law on grounds of newly discovered evidence and ineffective assistance of counsel. The trial court denied the motion in a written decision dated August 2, 1991.

In June 1995, Bennett, proceeding pro se, moved for a second time to vacate the judgment pursuant to New York Criminal Procedure Law § 440.10. In that motion, Bennett raised three claims: (i) that the trial court's refusal to allow a defense witness to testify at trial deprived him of his right to present witnesses, and of his right to confront witnesses against him; (ii) that the prosecutor's objection to the precluded witness's testimony amounted to prosecutorial misconduct; and (iii) that Bennett's exclusion from a pre-trial hearing to determine which of his past crimes could be used to impeach him if he testified violated his state-law right to be present.

In response, the People argued, among other things, that each of Bennett's claims was subject to a state procedural bar, which precluded the trial court from reviewing the claim on the merits. Specifically, the People argued that Bennett's first two claims were mandatorily barred from review under Section 440.10(2)(a) of the New York Criminal Procedure Law because they had been previously determined on the merits upon a direct appeal from the judgment. The People also argued that Bennett's third claim was mandatorily barred from review under Section 440.10(2)(c) of the New York Criminal Procedure Law because a sufficient record existed that would have

permitted adequate appellate review of that claim had it been raised on direct appeal, which Bennett unjustifiably failed to do. The trial court denied Bennett's motion in an oral decision issued on November 30, 1995.

In the Fall 1996, Bennett sent two letters to the trial court that had considered the motion to request a written order of its denial. New York state law required that Bennett include a written order of the denial in his application for leave to appeal that decision. See N.Y. Ct. Rules § 670.12(b)(2)(vi). The trial court informed him by letter on November 20, 1996, that his motion had been denied pursuant to an oral decision. Bennett subsequently sent several additional letters to the trial court seeking a written order.

Federal District Court Proceedings

On February 11, 1998, Bennett, proceeding pro se, filed a petition in the United States District Court for the Eastern District of New York for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In that petition he raised three claims: (i) that the trial court's preclusion of a defense witness's testimony had deprived him of his right to a fair trial, his right to present witnesses in his defense, and his right to confront witnesses against him; (ii) that his exclusion from a pre-trial evidentiary hearing to determine which of his past crimes could be used to impeach him if he testified had deprived him of his right to due process; and (iii) that he was deprived of his right to effective assistance of counsel because his trial attorney had failed to object to improper remarks made by the prosecutor during summation.

The United States District Court for the Eastern District of New York, asserting jurisdiction under 28 U.S.C.

§ 2254, sua sponte, dismissed the petition as untimely because the petition had exceeded the one-year statute of limitations period contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See 28 U.S.C. § 2244(d)(1).

In its order, the district court did not discuss the tolling provision set forth in 28 U.S.C. § 2244(d)(2).

On May 13, 1998, Bennett requested a Certificate of Appealability from the district court. In that application, he argued that the court had incorrectly dismissed his petition as time-barred because the state court's failure to issue a written order, which had precluded Bennett from obtaining leave to appeal that order, represented an unconstitutional state impediment that prevented him from filing a timely federal habeas petition. See 28 U.S.C. § 2244(d)(1)(B).

The district court issued a certificate of appealability, and on March 25, 1998, Bennett appealed to the United States Court of Appeals for the Second Circuit.

Second Circuit Decision on Appeal

The Second Circuit, in a decision dated October 25, 1999, reversed the district court's determination that the petition was barred by the AEDPA's statute of limitations. The court, addressing an issue not previously raised by Bennett, held, inter alia, that his 1995 state motion to vacate the judgment tolled the AEDPA's statute of limitations under Section 2244(d)(2). The Second Circuit interpreted the term "properly filed" in that provision to include any application for state post-conviction relief that is recognized as such under governing state procedures. See Bennett v. Artuz, No. 98-2452, 1999 U.S. App. LEXIS 26814, at *20 (2d Cir. Oct.

25, 1999). In so holding, the court rejected the argument that a post-conviction application is not "properly filed" if it is filed in a court that has no power to hear the merits of the application. Id. at *16-19.

The court acknowledged a split of authority among the federal circuits on the definition of the term "properly filed." Id. at *16 ("Circuit courts and district courts are split concerning the construction of the phrase.").

Petitioner seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations on state prisoners who wish to obtain habeas corpus review of their state convictions. The statute of limitations contains a tolling provision that suspends the limitations period for "properly filed" state post-conviction motions. It is this provision that has become the main battleground in determining the applicability of the statute of limitations. Indeed, no less than seven circuit courts have interpreted the provision, resulting in a wide split of authority that the circuits themselves have expressly acknowledged.

Moreover, the Second Circuit's broad interpretation of "properly filed" to include post-conviction applications filed in a court not empowered to hear the merits of the application is inconsistent with the purpose of the tolling

provision, which is designed to allow habeas petitioners time to exhaust their state remedies.

This Court has never interpreted the AEDPA's statute of limitations. There is, however, a pressing need for uniformity of application, as prisoners in one circuit will be barred from obtaining federal review while others faced with the same situation in a different circuit will obtain immediate access to such review.

I. There Is A Split Of Authority Among The Circuits Concerning What Constitutes A "Properly Filed" State Post-Conviction Application Sufficient To Toll The Statute Of Limitations Under The Anti-Terrorism And Effective Death Penalty Act Of 1996.

No less than seven circuit courts have spoken on the meaning of the term "properly filed" within the tolling provision set forth in 28 U.S.C. § 2244(d)(2).[1] Yet they have offered varying, indeed irreconcilable, interpretations as to the meaning of this term, which triggers the tolling provision of the AEDPA's statute of limitations. Moreover, the circuit courts themselves have acknowledged the split of authority on this issue as well as the inconsistent results that this split has engendered. Because this case presents an increasingly unsettled issue of law, it is worthy of this Court's review.

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[1] Webster v. Moore, No. 99-4201, 1999 U.S. App. LEXIS 31 (11th Cir. Jan. 4, 2000); Bennett v. Artuz, No. 98-2452, 1999 U.S. App. LEXIS 26814 (2d Cir. Oct. 25, 1999); Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999); Tinker v. Hanks, 172 F.3d 990 (7th Cir. 1999); Dictado v. Ducharme, No. 98-35531, 1999 U.S. App. LEXIS 20183 (9th Cir. Aug. 26, 1999); Lovasz v. Vaughn, 134 F.3d 146 (3d Cir. 1998); Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). The Fourth Circuit addressed the issue in an unpublished decision. See McSheffrey v. Angelone, No. 98-6519, 1999 U.S. App. LEXIS 2735 (4th Cir. Feb. 23, 1999).

Several circuit courts, influenced by the Third Circuit's decision in Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998), have interpreted "properly filed" to encompass virtually any post-conviction motion or petition. Under this view, a petitioner need not comply with ordinary state procedural rules so long as the petitioner tenders the motion papers in a manner consistent with mere technical requirements concerning time and place of filing. See id. at 148-49; Hoggro v. Boone, 150 F.3d 1223, 1226 n.4 (10th Cir. 1998); Webster v. Moore, No. 99-4201, 1999 U.S. App. LEXIS 31, at *7-9 (11th Cir. Jan. 4, 2000); Villegas v. Johnson, 184 F.3d 467, 470 n.2 (5th Cir. 1999). And petitions that a court has no power to hear on the merits because, for example, they are successive petitions barred from review under state law, would also be "properly filed" under this standard. McSheffrey v. Angelone, No. 98-6519, 1999 U.S. App. LEXIS 2735, at *5 (4th Cir. Feb. 23, 1999). Similarly, claims that are mandatorily procedurally barred from review under state law, or even claims that are jurisdictionally defective in ways not governed by the technical filing requirements, would be "properly filed" and toll the limitations period.[2]

The Ninth Circuit, by contrast, has applied a definition of the term "properly filed" that would exclude petitions that are procedurally barred under state law.

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[2] On the other hand, circuit courts adopting this view have generally held that applications that fail to comply with a state statute of limitations are not "properly filed" and therefore do not toll the statute of limitations under Section 2244 (d)(2). See Moore, No. 99-4201, 1999 U.S. App. LEXIS 31, at *5, 9 (state petition not "properly filed" because procedurally barred by state two-year statute of limitations); Hoggro, 150 F.3d at 1225, 1227 n.5 (appeal of denial of application for post-conviction relief not "properly filed" because appeal was untimely).

Dictado v. Ducharme, No. 98-35531, 1999 U.S. App. LEXIS 20183, at *7 (9th Cir. Aug. 26, 1999). A petition is not properly filed under this standard unless it is "submitted in compliance with the procedural laws of the state in which the application was filed." Id. In arriving at this holding, the court specifically rejected an interpretation of the term that would find as properly filed "any state application that appears on its face to comply with the state's basic procedural rules." Id. Thus, under the Ninth Circuit's standard, a claim that cannot be heard on the merits under state law because it is mandatorily barred from review would not be properly filed and would not toll the statute of limitations.

The Seventh Circuit would exclude still more petitions from the scope of the term "properly filed." The court held that an application for leave to file a state post-conviction application was not "properly filed" even though the application was not procedurally flawed in any way. Tinker v. Hanks, 172 F.3d 990, 991 (7th Cir. 1999). The court reasoned that because the state requires leave of the appellate court to file second or subsequent post-conviction applications in order to "cut down on the paper flow from prisoners," it would serve neither state nor federal law to interpret the term "properly filed" to allow prisoners to mechanically file leave applications merely to extend the AEDPA's statute of limitations. Id.

Finally, the Second Circuit in the case at bar has provided yet another interpretation of the term. The court construed "properly filed application" to mean an "application for post-conviction relief recognized as such [by the state court]." Bennett, No. 2452, 1999 U.S. App. LEXIS 26814, at *20. With no further elaboration on this definition, the court considered as "properly filed" an application that

sought to raise in the trial court claims that, under state law, could only be raised on direct appeal. Even though the trial court had no power whatsoever to treat these on-the-record claims, the Second Circuit declined to give effect to the state mandatory bar. Id. at *15.

As these divergent holdings make clear, there is a conflict among a majority of circuit courts concerning the definition of the term "properly filed" within the AEDPA's tolling provision. Indeed, even the Second Circuit in its decision acknowledged the conflict by stating, "Circuit and district courts are split concerning the construction of the phrase." Id. at *16. And the Eleventh Circuit similarly commented: "Federal courts have begun to struggle with the meaning of the term 'properly filed' . . . and have developed different interpretive approaches." Moore, No. 99-4201, 2000 U.S. App. LEXIS 31, at *5.

This discord is particularly significant for at least three reasons. First, the applicability of the tolling provision is dispositive of a habeas litigant's ability to obtain review in federal court, an issue that has always been of particular concern to this Court. See generally 1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 2.3, at 16-21 (3d ed. 1998). Indeed, unlike many provisions of habeas corpus law, the provision at issue here does not apply to a particular claim raised in the petition, but rather to the petition as a whole. The AEDPA's statute of limitations is a gateway to federal court, and that statute, along with the tolling provision, will be the deciding factor in determining whether a habeas litigant obtains access to the federal courts at all.

Second, the issue is one that recurs with alarming frequency; indeed, it is now at the center of judicial

disagreement concerning the AEDPA's statute of limitations provisions. In a span of less than two years, no less than seven circuit courts have been forced to write on the issue, and district courts in several other circuits have also had to address claims made under the tolling provision. This recurrence is hardly surprising, as state prisoners routinely file multiple post-conviction applications in state courts,[3] just as they have historically done in the federal courts. See McCleskey v. Zant, 499 U.S. 466, 470 (1991). These applications for post-conviction relief frequently encompass large blocks of time that may or may not be excluded under the tolling provision. The tolling provision thus comes into play in many cases, and is routinely invoked to avoid the effects of the AEDPA's one-year statute of limitations.

Third, the practical outcome of the division is that similarly positioned habeas litigants in different jurisdictions will receive unequal access to the writ. A litigant who fails to comply with a mandatory provision of state law in one circuit will not be able to obtain any review of his federal claims, while a similarly situated litigant in a different circuit will have immediate access. This difference in treatment cannot be justified.

Thus, there exists an acute need for this Court to resolve the question of what constitutes a "properly filed" post-conviction application. It is a determination that will resolve inequities in the treatment of habeas petitioners and that will have almost daily application in the lower federal courts.

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[3]Indeed, this problem has been so serious at to cause many states to enact severe limitations on successive petitions, much as Congress did in the AEDPA. See, e.g., Tex. Code Crim. P. art. 11.07, § 4.

II. The Second Circuit Has Interpreted The Term "Properly Filed" Within The Tolling Provision Set Forth In 28 U.S.C. § 2244(d)(2) In A Way That Is Inconsistent With The Intent Of The Statute And With The Tolling Provision's Underlying Goal To Permit The Exhaustion Of State Court Remedies.

The Second Circuit has interpreted the term "properly filed application" within the AEDPA's tolling provision to mean "an application for state post-conviction relief recognized as such under governing state procedures . . . ." Bennett, No. 98-2452, 1999 U.S. App. LEXIS 26814, at *20. But, to the extent that any rational interpretation can be placed on this language, it is far too inclusive, encompassing not only applications that the state court has no power to review, but apparently almost any piece of paper that can be "recognized" as a post-conviction motion, regardless of compliance with state law. More importantly, such a broad interpretation of "properly filed" is inconsistent with the purpose of the tolling provision, which is designed to allow a habeas petitioner time to exhaust his state remedies, because it includes applications that cannot possibly serve that goal.

Preliminarily, the Second Circuit's formulation is not susceptible to easy interpretation. While it appears to demand some adherence to "governing state procedures," it does not specify which procedures require such compliance. And although the court's terminology is all-inclusive, such an interpretation would be inconsistent with the final disposition in the case at bar. Indeed, the Second Circuit found that Bennett's post-conviction application, which was procedurally barred from review under New York state law, was nonetheless a "properly filed application" under "governing state procedures."

The apparent intended interpretation of this language is that a post-conviction application is properly filed if it is merely "recognized" or identified as a post-conviction application by the state court receiving it. In other words, any papers filed by a state prisoner in state court trigger the tolling provision unless the clerk cannot even recognize them as a post-conviction application, and either rejects them outright or forwards them to some other body or agency. But this interpretation is equally problematic, because it encompasses far too many applications for collateral review and lends itself to an arbitrary and, hence, inconsistent application of the tolling provision. This standard will often place dispositive weight on the ministerial determinations of a court clerk who decides whether to reject or calendar an application. Congress could not have intended the application of the AEDPA's only tolling provision to turn on such a potentially unreasoned and arbitrary decision.

In addition, the Second Circuit's interpretation of "properly filed" does nothing the further the goal of exhaustion, which underlies the AEDPA's tolling provision. This provision, which suspends the statute of limitations while a state prisoner pursues his claims in state court, serves the AEDPA's policy goal to "provide[] for the exhaustion of state remedies and require[] deference to the determinations of state courts." H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 944. See also Mills v. Norris, 187 F.3d 881, 883-84 (8th Cir. 1999) (noting that "the tolling period in § 2244(d)(2) complements [the exhaustion requirement under 28 U.S.C. § 2254(c)] by extending the time for filing federal petitions while state remedies are being exhausted"). The Second Circuit's interpretation of the term "properly filed application" to include claims raised in a court not empowered to hear them in no way furthers the goal of exhaustion.

The Second Circuit found that Bennett's motion to vacate judgment was a "properly filed application" even though it raised claims that were mandatorily procedurally barred under New York state law. Section 440.10(2)(a) of the New York Criminal Procedure Law precludes a trial court from reviewing a claim that was previously determined on the merits upon a direct appeal. And Section 440.10(2)(c) prohibits the trial court from reviewing a claim for which there is a sufficient basis in the record to have permitted adequate review of the claim on direct appeal, but the defendant unjustifiably failed to raise the issue on direct appeal. Of the claims raised by Bennett both in his motion to vacate judgment and in his habeas petition all were on-the-record claims, which the trial court had no power to review on the merits.[4] Thus, the filing of this application in no way assisted Bennett in exhausting his state claims. Nonetheless, the Second Circuit found that the motion was indeed a "properly filed" and that, as a result, Bennett should benefit from the tolling provision.

Not only is the Second Circuit's decision at odds with the exhaustion requirement, but it also violates federal principles of comity that underlie the requirement. One of the central purposes of the AEDPA was to "'reduce federal intrusion into state criminal proceedings,'" Lovasz, 134 F.3d at 148 (quoting Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997)), and accord greater deference to state court

[4]Petitioner's claim that the trial court had erroneously precluded a defense witness from testifying at trial already had been raised and decided on direct review. See People v. Bennett, 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987). Petitioner's claim that he had been excluded from a hearing in violation of People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974), and People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761 (1992), was an on-the-record claim that could have been raised on direct appeal, but was not.

adjudications. See 28 U.S.C. §§ 2254 (d)(1)-(2), (e)(1). See also Gochicoa v. Johnson, 118 F.3d 440, 444 (5th Cir. 1997); Drinkard v. Johnson, 97 F.3d 751, 767-69 (5th Cir. 1996). Yet the Second Circuit's holding is not in keeping with this statutory purpose. Indeed, it runs counter to it. By deeming a motion that is procedurally barred from judicial review under state law as "properly filed," the Second Circuit pays no deference to the state court's determination that it has no power to review that claim.

Moreover, the Second Circuit's reluctance to interpret the tolling provision to require a procedurally viable post-conviction application is unwarranted. See Bennett, No. 98-2452, 1999 U.S. App. LEXIS 26814, at *19. Indeed, such a requirement would carry out the provision's purpose of facilitating the exhaustion of state-court remedies. Nor would such an inquiry into state procedural rules be an inappropriate role for the federal courts, as those courts routinely interpret state court procedural requirements in determining whether claims that are unexhausted can be returned to state court. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Finally, the Second Circuit's interpretation of the tolling provision undermines the purposes of the limitations period because it allows prisoners to file endless state applications that do nothing to further exhaust their claims. See Tinker, 172 F.3d at 991. The illogical result of the Second Circuit's holding is that the statute of limitations could be tolled indefinitely by the petitioner whose post-conviction motion papers are merely accepted by the clerk of the court even though the motion may do nothing to exhaust that petitioner's state court remedies.

Thus, the Second Circuit's construction of the phrase "properly filed" to include applications filed by a prisoner in a state court that has no power to review them on the merits in no way furthers the purposes of exhaustion, comity, or the statute of limitations. The court's construction, moreover, effectively places in the hands of the court clerk who initially receives the application the ultimate determination of whether a post-conviction application is properly filed. Congress surely could not have intended such an arbitrary and inconsistent application of the tolling provision, resulting in similarly situated prisoners receiving unequal access to the writ.

CONCLUSION

For the aforementioned reasons, Petitioner, Christopher Artuz, respectfully requests this Court to find that: (1) there is an irreconcilable split among a majority of the circuit courts concerning the meaning of the term "properly filed" within the tolling provision of the AEDPA's statute of limitations so as to warrant the granting of Certiorari, and (2) the Second Circuit's interpretation of the term "properly filed" conflicts with the intent of the statute and with the tolling provision's underlying goal to permit the exhaustion of state court remedies.

Respectfully submitted,

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January 24, 2000

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TONY BRUCE BENNETT,	:	
	:	
Petitioner,	:	98-CV-1274
	:	ORDER
v.	:	
	:	
CHRISTOPHER ARTUZ, Superintendent, Greenhaven Correctional Facility,	:	
	:	
Respondent.	:	

GERSHON, United States District Judge:

Petitioner Tony Bruce Bennett has petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. I have determined that the petition is untimely and should be summarily dismissed.

The petitioner was convicted in New York Supreme Court, Queens County, on March 28, 1984, of various counts of attempted murder, criminal possession of a weapon, reckless endangerment, criminal possession of stolen property and unauthorized use of a vehicle. His conviction was affirmed by the Appellate Division, Second Department, on March 2, 1987. People v. Bennett, 128 A.D.2d 540 (1987). Leave to appeal was denied by the New York Court of Appeals on May 2, 1987. People v. Bennett, 69 N.Y.2d 1001 (1987). The petitioner did not seek a writ of certiorari to the United States Supreme Court. The petitioner has also twice moved in Supreme Court, Queens County, to vacate his conviction. The first of these motions was denied on August

2, 1991 and the second was denied on a date that the petitioner is not able to specify. The instant petition is dated February 11, 1998.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, among other things, amended 28 U.S.C. § 2244 to provide a one-year limitations period for filing state habeas corpus petitions. The one-year limitations period runs from the latest to occur of certain events, the only relevant one of which, in this case, is the "date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The running of the limitations period is tolled for the time during which a "properly filed application" for collateral review is pending in state court. 28 U.S.C. § 2244(d)(2).

The one-year limitations period does not apply in case, where as here, the judgment of conviction became final before April 24, 1996, the effective date of AEDPA. In these circumstances, the Court of Appeals for the Second Circuit has held that "a habeas petitioner is entitled to a reasonable time after the effective date of the AEDPA to file a petition." Peterson v. Demskie, 107 F.3d 92, 92 (2d Cir. 1997). Although the court did not define what constitutes a "reasonable time," it explained that, when a prisoner has had "several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." Id. at 93. Nevertheless, it also cautioned that the "reasonable time" period should not be applied with "undue vigor." Id. The court concluded that a petition filed seventy-two days after the effective date of the AEDPA, where the conviction became final in 1978, was timely. Id.

Here, the petitioner filed his petition on February 11, 1998,[1] one year and nine and one-half months after the effective date of the AEDPA and more than ten years after his conviction became final.[2] The petition does not set forth any reason for this delay. In addition, even though the petitioner has filed two motions to vacate his convictions, he has had several years to contemplate bringing the instant petition. Upon these facts, the instant petition is clearly untimely under Peterson.

CONCLUSION

The petition is DISMISSED.

SO ORDERED.

s/Nina Gershon
Nina Gershon
United States District Judge

Dated: February 25, 1998
Brooklyn, New York

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[1] Where a petitioner is proceeding pro se, the prisoner is deemed to have filed a document when it is delivered to a prison authority for forwarding to clerk of the court. See Houston v. Lack, 487 U.S. 266 (1988). Here, the petition was dated February 11, 1998, and was filed at the Clerk's Office on February 20, 1998. Although there is no evidence that the petition was actually delivered on that date, the petition will be treated as being filed on February 11, 1998.

[2] Petitioner's conviction became final on August 2, 1987, ninety days after the New York Court of Appeals denied his request for leave to appeal, which was the last date on which he could have petitioned the United States Supreme Court for a writ of certiorari. See Caspari v. Bohlen, 510 U.S. 383 (1994); Supreme Court Rule 13.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: September 24, 1999 Decided: October 25, 1999)
Final brief submitted September 29, 1999

Docket No. 98-2452

TONY BRUCE BENNETT,

Petitioner-Appellant,

– v. –

CHRISTOPHER ARTUZ, Superintendent,

Respondent-Appellee.

Before:

WINTER, Chief Judge,
KEARSE, and MCLAUGHLIN, Circuit Judges.

Appeal from a sua sponte order by the United States District Court for the Eastern District of New York (Nina

Gershon, Judge) dismissing a petition for habeas corpus relief as untimely. We reverse and remand.

ELLEN B. RESNICK, Law Offices of Alan S. Futerfas, New York, New York, for *Petitioner-Appellant*

KATHLEEN O'LEARY, Assistant District Attorney, Queens County (Richard A. Brown, District Attorney, Queens County, John M. Castellano, Assistant District Attorney, Queens County, of counsel), Kew Gardens, New York, for *Respondent-Appellee*.

WINTER, Chief Judge:

Tony Bruce Bennett appeals from Judge Gershon's sua sponte dismissal of his habeas corpus petition pursuant to 28 U.S.C. § 2254 as untimely. The district court concluded that the petition was time-barred based on the fact that the petition was filed more than twenty-one months after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and on our decision in Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997), holding that prisoners whose convictions became final prior to the AEDPA's enactment have only a "reasonable time" after the enactment to bring federal habeas petitions. For the reasons set forth below, we reverse and remand.

Following a 1984 jury trial in New York Supreme Court, Queens County, appellant was convicted of two counts of attempted murder in the first degree, criminal possession of a weapon in the second degree, two counts of reckless endangerment in the first degree, criminal possession of stolen property in the first degree, and unauthorized use of a motor vehicle. The evidence introduced at trial established, among other things, that appellant fired two bullets at a police car during a car chase. The Appellate Division, Second Department, affirmed the conviction in a decision dated March 2, 1987. See People v. Bennett, 512 N.Y.S.2d 472 (App. Div. 1987). Leave to appeal the decision to New York's Court of Appeals was thereafter denied. See People v. Bennett, 511 N.E.2d 93 (N.Y. 1987) (table).

In May 1991, appellant moved to vacate the judgment of conviction pursuant to N.Y. Crim. Proc. Law ("CPL") § 440.10 on the grounds of newly discovered evidence and ineffective assistance of counsel. The motion was denied in an August 1991 order. In June 1995, appellant moved pro se to vacate the judgment of conviction pursuant to CPL § 440.10 (the "1995 Motion"). The 1995 Motion asserted that the trial court denied appellant the right: to be present at the Sandoval hearing and at other critical stages of trial, and to offer certain testimony at trial. Appellee maintains that the 1995 Motion was denied "by the state court in an oral decision on November 30, 1995," in a ruling "without any conclusions of law or fact." Appellant represents that he never received a copy of an order denying the 1995 Motion despite having written numerous letters to the state court requesting information on the disposition of the motion and requesting a written copy of the disposition. For purposes of this appeal, we view the record in the light most favorable to appellant and accept his representation that service of a

written order never occurred. On remand, of course, this will be a factual issue to be resolved.

On February 11, 1998, appellant filed the instant petition. He alleged in the petition violations of his constitutional rights: (i) to present witnesses in his defense and to a fair trial; (ii) to be present at all material stages of the trial; and (iii) to the effective assistance of counsel. The district court dismissed the petition sua sponte as time-barred but granted appellant's motion for a certificate of appealability ("COA"). When the district court dismissed the petition, however, appellant's representations concerning the 1995 Motion was not before it. These came to light only when appellant moved the district for a COA.

In determining whether the petition was properly dismissed, we address three issues: (i) whether the AEDPA's pending-state-petition tolling provision, 28 U.S.C. § 2244(d)(2), applies because appellant's conviction became final prior to the AEDPA's enactment; (ii) if that tolling provision applies, whether the 1995 Motion was "pending" within the meaning of that provision; and (iii) if that tolling provision applies, whether appellant's 1995 Motion was "properly filed" within the meaning of that provision.

a) Applicable Limitations Period and the AEDPA's Tolling Provision

Prior to the enactment of the AEDPA, there was no formal limit on the time for filing a habeas corpus petition pursuant to 28 U.S.C. § 2254. Delayed filing of a petition was a basis for dismissal only if the appellant knew or could have known the grounds for the petition earlier and if the state demonstrated "that the delay prejudiced [it] in its ability to respond to the petition." Ross v. Artuz, 150 F.3d 97, 99

(2d Cir. 1998) (alteration in original) (internal quotations and citation omitted). The AEDPA changed this by imposing a one-year limitations period on habeas petitions that begins to run from the latest of several events, including the date on which the challenged state judgment becomes final. See generally 28 U.S.C. § 2244(d)(1).

The AEDPA's one-year limitations period does not strictly apply to the instant petition because appellant's conviction became final prior to the AEDPA's enactment. See Reyes v. Keane, 90 F.3d 676, 678-79 (2d Cir. 1996) (holding that the AEDPA's one-year limitations period does not apply retroactively); overruled on other grounds by Lindh v. Murphy, 521 U.S. 320, 336-37 (1997) (holding that the AEDPA provisions for noncapital cases "generally apply only to cases filed after [the AEDPA] became effective"). However, we have held that prisoners whose habeas claims accrued prior to the AEDPA's enactment were afforded the "reasonable time" of "one year after the effective date of the AEDPA" to file a federal habeas petition. Ross, 150 F.3d at 102-03. That one-year grace period expired April 24, 1997, over nine months before the instant petition was filed.

However, the AEDPA provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2). By not counting the time during which a petition is pending in state court, the tolling provision preserves the "long-standing federal policy" of requiring habeas appellants to exhaust state court remedies prior to initiating suit in federal court. Mills v. Norris, 187 F.3d 81, 83-84 (8th Cir. 1999) (noting that "[t]he tolling period in § 2244(d)(2) complements [the exhaustion requirement under 28 U.S.C. §

2254(c)] by extending the time for filing federal petitions while state remedies are being exhausted); see also O'Sullivan v. Boerckel, 119 S.Ct. 1728, 1732 (1999) (noting that exhaustion doctrine is based upon the understanding that "state courts should have the first opportunity to review [an unlawful confinement] claim and provide any necessary relief").

We have not yet considered whether the pending-state-petition tolling provisions extends the one-year grace period established in Ross. Several other circuit courts have considered the issue, however, and have held that the tolling provision applies to petitions challenging pre-AEDPA convictions. See Gaskins v. Duval, 183 F.3d 8, 10 (1st Cir. 1999); Fields v. Johnson, 159 F.3d 914, 916 (5th Cir. 1998) (per curiam); Gendron v. United States, 154 F.3d 672, 675 (7th Cir. 1998) (per curiam) (resolving consolidated cases), cert. denied 119 S. Ct. 1758 (1999); Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir. 1998); Lovasz v. Vaughn, 134 F.3d 146, 149 (3d Cir. 1998); see also Mills, 1999 WL 637077, at *1-2 (applying § 2244(d) tolling provision to habeas petition challenging pre-AEDPA conviction without discussing propriety of doing so); Guenther v. Holt, 173 F.3d 1328, 1331 (11th Cir. 1999) (same). We agree with these circuits and hold that the AEDPA's pending-state-petition tolling provision does apply to a petition challenging a pre-AEDPA conviction. To hold otherwise would effectively discourage appellants from starting and completing the state-court review process.

b) "Pending" Motion Under 28 U.S.C. § 2244(d)(2)

We further conclude that the 1995 Motion was still "pending" before the New York courts in February 1998, for purposes of 28 U.S.C. § 2244(d)(2), when appellant filed the

instant petition. Accordingly, the limitations period in which appellant had to file his habeas petition was tolled.[3]

The AEDPA's tolling provision complements the 28 U.S.C. § 2254(c) exhaustion requirements by tolling the limitations period on federal habeas petitions while an appellant pursues state-court remedies. See Mills, 187 F.3d 883-84. When Congress enacted the AEDPA, one of its policy goals was to "provide[] for the exhaustion of state remedies and require[] deference to the determination of state courts." H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 944. Indeed, "[t]olling the federal statute of limitations while the state prisoner is properly adhering to exhaustion requirements reinforces the orderly presentation of claims to the appropriate state tribunals and obviates the need for federal action." Nino v. Galaza, 183 F.3d 1003, 1005 (9th Cir. 1999). If we were to hold that a post-conviction petition is not pending before state courts during the intervals between disposition and appeal, we would force appellants into federal court prematurely, before "giving] . . . state courts [a] full opportunity to resolve any constitutional issues." O'Sullivan, 199 S. Ct. at 1732. We therefore hold that a state-court petition is "pending" from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures. Having determined the circumstances during which a state-court petition may be considered "pending," we now address whether appellant's 1995 Motion falls within those circumstances.

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[3] We note that the issue before us does not involve the need for appellant to exhaust state remedies. We decide only that the pending-state-petition tolling provision applies to appellant's 1995 motion, whether or not its filing was a prerequisite to a subsequent federal petition.

The 1995 Motion was a motion to vacate judgment pursuant to CPL § 440.10. Under CPL § 450.15, a movant may appeal the denial of a § 440.10 motion to vacate judgment "provided that a certificate granting leave to appeal is issued pursuant to [CPL §] 460.15." And, under the rules of the Second Department, a certificate for leave to appeal must be made in writing within thirty days of service of the adverse order. These rules state, in relevant part, that:

> (1) An application pursuant to . . . CPL 460.15 for leave to appeal to this court from an order shall be made in writing within 30 days after service of the order upon the applicant . . . .
>
> (2) The application . . . shall include . . . (vi) a copy of the order sought to be reviewed and a copy of the decision of the court of original instance or a statement that there was no decision.

N.Y. Ct. Rules § 670.12(b)(1) & (b)(2)(vi) (emphasis added); see also CPL § 460.10(4) ("An appeal by a defendant to an intermediate appellate court by permission, pursuant to [CPL §] 450.15, is taken" by applying for a § 460.15 certificate "(a) [within thirty days after service upon the defendant of a copy of the order sought to be appealed . . . ." (emphasis added)).

Appellees argue that appellant's motion was no longer pending by the end of 1996, when he learned of the oral denial of the motion and neither filed an application for leave to appeal nor sought a writ of mandamus pursuant to Article 78 to compel the state court to issue an appealable order. However, we conclude that the 1995 Motion was an is still "pending" in the New York courts for purposes of the AEDPA tolling provision. If Appellant was never served

with a copy of the order denying the 1995 Motion, he could not apply for a certificate for leave to appeal because the thirty-day period for applying for the certificate has not yet commenced. See People v. Washington, 657 N.E.2d 497, 498 (N.Y. 1995) (holding that "service by the prevailing party is necessary under CPL 460.10 in order to commence the time period for the other party to take an appeal"). Moreover, appellant allegedly wrote numerous letters to the state court concerning the 1995 Motion so that he could pursue the matter. The state court, however, allegedly failed to respond appropriately to appellant's requests. We also reject appellees' contention that the pending-state-petition tolling period does not apply because appellant did not file a petition for a writ of mandamus under Article 78. In our view, it is not a petitioner's burden to cause state courts to act expeditiously to avoid a time bar claim raised by the state itself. See O'Sullivan, 119 S. Ct. at 1732 ("[S]tate prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process . . . .")

Thus, we hold that the time for appealing the New York Supreme Court's denial of the 1995 Motion has not yet expired. See Mills, 187 F.3d at 884 (holding that state post-conviction motion was "pending" until expiration of ninety-day period appellant had to file a transcript to perfect state-court appeal); Taylor v. Lee, 186 F.3d 557, 561 (4th Cir. 1999) (holding that "under § 2244(d)(2) the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court . . . is tolled from the limitations period"); Nino, 183 F.3d at 1004 (holding that "the time tolled for exhaustion of state remedies pursuant to 28 U.S.C. § 2244(d) includes the interval between the disposition of . . . [a] post-conviction petition and the filing of an appeal . . . at the next state appellate level"); Guenther,

173 F.3d at 1331 (holding that state-court proceeding was "pending" from time appeal was filed until Alabama's Supreme Court denied discretionary review); Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999) (holding that term "pending" must be construed "to encompass all of the time during which a state prisoner is attempting, through proper user of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application").

Accordingly, appellant's federal habeas petition is not untimely because, if his representations are true, the one-year grace period he has to file his petition under Ross has not yet commenced.[4]

c) "Properly Filed" Under 28 U.S.C. § 2244(d)(2).

Appellee also argue that appellant's 1995 Motion was not "properly filed" because "he did not bring the on-the-record claims raised in that motion in a court that was empowered to review them on the merits." Appellee contends that claims in the 1995 Motion were "subject to a mandatory procedural l bar under state law" because one of the claims had already been decided on direct review and the

[4] We need not determine whether any of the claims asserted in the petition are viable. Appellant's ineffective assistance of counsel claim may be untimely despite AEDPA's tolling provision. Indeed, that claim was rejected by the state court in 1991, and appellant did not file a petition for relief as to that claim by April 24, 1997. Nevertheless, the 1995 Motion was pending as of April 24, 1997 and it is possible that, in accordance with Rose v. Lundy, 455 U.S. 509 (1982), appellant was attempting to exhaust administrative state remedies on all his claims prior to filing a federal petition for relief. Whether the 1995 Motion tolled the statute of limitations for the ineffective assistance of counsel claim is, therefore, to be determined by the district court on remand.

other claim "had a sufficient record basis for direct review."[5] Again, we disagree.

"Neither the AEDPA nor its legislative history explains which state filings quality as properly filed applications." Villegas v. Johnson, 184 F.3d 467, 470 (5th Cir. 1999) (citing relevant legislative history). Circuit and district courts are split concerning the construction of the phrase. "The majority of courts that have considered this issue have concluded that '"a properly filed application" is one submitted according to the state's procedural requirements, such as the rules governing notice and the time and place of filing.'" Villegas, 184 F.3d at 469-79 (quoting Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998) and collecting cases). A minority of courts, however, have

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[5] To support the argument, appellee cites CPL §§ 440.10(2)(a) & (c) providing that:

> Notwithstanding the provisions of subdivision one [permitting a motion to vacate at any time after entry of judgment], the court must deny a motion to vacate a judgment when:
>
> > (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or . . .
> >
> > (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him . . . .
>
> CPL § 440.10(2).

construed "properly filed" more broadly, and have held that federal petitioners whose pending state court applications are barred under state successive post-conviction provisions are not "properly filed." See Dictado v. Ducharme, __F.3d__, No. 98-35531, 1999 WL 646953, at *2 (9th Cir. Aug. 26, 1999) (holding that "properly filed" means an "application submitted in compliance with the procedural laws of the state in which the application was filed" such that application rejected by the state's highest court because it was procedurally barred is not properly filed under the AEDPA's tolling provision) (emphasis added); Tinker v. Hanks, 172 F.3d 990, 991 (7th Cir. 1999) (holding that application for permission required to file successive petition under state law did not constitute properly filed application because "Congress could not have intended that the time for filing the federal action be tolled indefinitely by the simple expedient of filing repeated applications for leave to file state postconviction proceedings").

Appellee urges us to take the broader view of the term "properly filed" as discussed by the Dictado court and some district courts in this circuit. See Hill v. Keane, 984 F. Supp. 157, 158-59 (E.D.N.Y. 1997) (holding that state petition for collateral relief was not properly filed because it relied solely on record facts and defendant is "procedurally barred from moving to vacate a judgment of conviction under [CPL] § 440.10(1) when he could have raised his claims on direct appeal"); Valentine v. Senkowski, 966 F. Supp. 239, 241 (S.D.N.Y. 1997) (assuming that post-conviction application, "although always timely, must also be non-frivolous in order to be 'properly filed'"); but see e.g., Hughes v. Irvin, 967 F. Supp. 775, 778-79 (E.D.N.Y. 1997) (rejecting proposition "that a seemingly frivolous collateral attack [under CPL § 440] is not 'properly filed' for purposes of tolling the one-year statute of limitations"). We decline to do so.

Determining whether a pending-state-court motion is procedurally barred under a state law such as CPL §§ 440.10(2) is beyond the appropriate role of a federal court in addressing whether a state post-conviction application was "properly filed." It would involve federal courts in making determination as to the proper outcome of pending state proceedings based on state law when a state court is positioned to make the very same decision. Moreover, these issues are often not clear-cut. For example, determining whether a state court motion is procedurally barred because a defendant did not raise the issue on direct appeal would require that we ascertain whether "sufficient facts appear on the record of the proceedings" as well as determine whether a defendant's failure to bring the claim constitutes "unjustifiable failure." CPL § 440.10(2)(c).

Like the Fifth and Third Circuits, "we are reluctant to engraft a merit requirement into § 2244(d)(2) without some indication of congressional intent to do so." Villegas, 184 F.3d at 470. Section 2244(d)(2) requires only that a state application be "properly filed." Had Congress "intended to condition tolling on a state court finding of merit, it could have drafted § 2244(d)(2) to exclude frivolous petitions . . . [and to] clearly with[o]ld tolling from prisoners filing . . . procedurally barred claims." Villegas, 184 F.3d at 470. As the Villegas court observed, "Congress enacted the AEDPA against a backdrop of federal habeas law dealing with procedurally barred claims." Id. (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)). Indeed, Congress addressed the problems associated with successive federal habeas petitions by severely restricting a prisoner's ability to file more than one federal habeas petition. See 28 U.S.C. §§ 2244(a) & (b).

Nor are we persuaded, as appellees maintain, that construing "properly filed" narrowly will "invit[e] a 'paper flow' by state prisoners trying to extend the time in which they can file a habeas corpus petition indefinitely." As the Villegas court observed, and we agree:

> [I]n nearly every case, the tolling will last only as long as the state court takes to resolve the pending application because any lapse of time before a state application is properly filed will be counted against the one-year limitations period. Thus, a prisoner will not be able to revive an expired limitation period by simply filing a state petition in conformity with the basic procedural requirements. Furthermore, the potential for delay may decline as states place stricter restrictions on the filings that are the basis of tolling.

Villegas, 184 F.3d at 472-73 (citation omitted). We would add only that prisoners serving jail time usually have little incentive to delay determination of their habeas petitions.

We therefore construe "properly filed" to mean simply that an application for state post-conviction relief recognized as such under governing state procedures has been filed. Appellant's 1995 Motion qualifies under that standard. Accordingly, appellant's federal habeas petition is not untimely because the 1995 Motion was "properly filed."

We therefore reverse and remand for further proceedings.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

___AD2D_____ Submitted - January 22, 1987

WILLIAM C. THOMPSON, J.P.
JAMES F. NIEHOFF
MOSES M. WEINSTEIN
GERALDINE T. EIBER, JJ.

2754 E

The People, etc., respondent, v. Tony Bennett, appellant. (Ind. No. 842/93)

DECISION AND ORDER

Donald E. Gilbert, New York, N.Y., for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Seymour Roth of counsel) for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 25, 1984, convicting him of attempted murder in the first degree (two counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (two counts), criminal possession of stolen property in the first degree and unauthorized use of a motor vehicle, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Upon the exercise of our factual review power we are satisfied that the evidence was of sufficient quantity and quality to establish the defendant's guilt beyond a reasonable doubt. The two police officer victims separately identified the defendant in a lineup and such identifications by police officers, who are trained to carefully view and identify suspects, are entitled to great weight (see People v. Morales, 37 N.Y.2d 262).

Further, while the court erred in precluding the defendant from calling a defense witness, Mr. Mahamed, who would have testified that he had spoken with the defendant and his alibi witness approximately one hour after the commission of the crime, this error does not warrant reversal. The defendant had testified that he was at his friend's house at the time the crime was committed and had joined the crowd that appeared near the scene of the crime when shots were heard. His friend corroborated this account. The defendant further testified that he had spoken to Mr. Mahamed, his neighbor, near the scene and had inquired as to what was happening. As Mahamed's testimony would not have accounted for the defendant's whereabouts during the crime or placed him away from the crime scene shortly thereafter (see People v. Cuevas, 67 A.D.2d 219), he was not an alibi witness (C.P.L. § 250.20). Thus, the defendant was not required to include his name in his notice of alibi and he should have been permitted to call him as a witness. However, in light of the overwhelming evidence of guilt, this testimony concerning the defendant's presence near the scene of the crime approximately one hour after its commission was harmless beyond a reasonable doubt (see People v. Crimmins, 36 N.Y.2d 230).

We have examined the defendant's remaining contentions and find them to be without merit.

THOMPSON, J.P., NIEHOFF, WEINSTEIN, and EIBER, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

ORIGINAL

(5)

ALAN S. FUTERFAS
ATTORNEY AT LAW

Supreme Court, U.S.
FILED
MAR 16 2000
CLERK

ELLEN B. RESNICK

260 MADISON AVENUE
NEW YORK, NEW YORK 10016
(212) 684-8400
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March 16, 2000

By Federal Express

Clerk of the Court
United States Supreme Court
U.S. Supreme Court Building
One First Street, N.E.
Washington D.C. 20543

Re: Artuz v. Bennett, 99-1238

Dear Clerk of the Court:

Enclosed please find ten copies and one original of Respondent Tony Bennett's Brief in Opposition to the Petition for Writ of Certiorari filed in the above-referenced case. Pursuant to Rule 39 of the Supreme Court Rules, Mr. Bennett respectfully moves for permission to proceed *in forma pauperis*. Undersigned counsel was appointed by the Second Circuit to represent Mr. Bennett pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Thank you for your consideration in this matter.

Respectfully yours,

Ellen B. Resnick

Ellen B. Resnick

(Enc.)

cc: John M. Castellano (By Federal Express)
Appeals Bureau
Office of the Queens County District Attorney
125-01 Queens Boulevard
Kew Gardens, New York 11415

RECEIVED
MAR 17 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

16pp

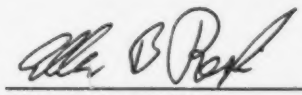
CERTIFICATE OF SERVICE

Pursuant to Rule 29 of the Supreme Court Rules, I, Ellen B. Resnick, affirm that:

1. I was appointed by the Second Circuit to represent Tony Bruce Bennett, the Respondent in this action, pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

2. Three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari in *Artuz v. Bennett*, No. 99-1238, was sent on March 16, 2000 by Federal Express to John Castellano, Esq., Assistant District Attorney for the Queens District Attorney's Office Appeals Bureau, 125-01 Queens Boulevard, Kew Gardens, New York 11415. ((718)-286-5801)

3. There are no other parties in this action.



Ellen B. Resnick

QUESTION PRESENTED

Is a successive state court post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions in the Anti-Terrorism and Effective Death Penalty Act of 1996, if it is filed in a court that declines review of the application on the merits because the application is procedurally barred?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Tony Bruce Bennett, respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on October 25, 1999, reproduced in the Appendix to the Petition for a Writ of Certiorari at 4a-20a, and reported in *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999).

STATEMENT OF THE CASE

The petitioner, Christopher Artuz, Superintendent of the Greenhaven Correctional Facility, asks the Court to address the scope of the tolling provision contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") which suspends the one-year statute of limitations imposed on state habeas petitioners wishing to obtain habeas corpus review of their state convictions while a petitioner's "properly filed" state post-conviction motion is "pending."

Respondent does not dispute the Petitioner's Statement of the Case.

REASONS FOR DENIAL OF THE WRIT

While seven circuit courts have interpreted the meaning of "properly filed" in 28 U.S.C. § 2244(d)(2), six of these seven courts have issued consistent decisions, including the Second Circuit's decision below. Only the Eleventh Circuit's recent decision, issued after Petitioner Artuz's petition was filed, is in direct conflict with the decision below. In addition, review is unwarranted because: (1) the states, themselves, have the ability to limit state habeas petitioners' access to the federal courts independent of the federal courts' construction of the AEDPA's tolling provision; (2) a decision by this Court will have little practical impact as the

tolling provision in question has long since expired on the vast majority of state habeas petitioners' applications for relief in federal court; and (3) the facts of this case are such that the Court would have to delve into the merits of Respondent's state post-conviction application.

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH ALL BUT ONE OF THE SIX OTHER CIRCUITS THAT HAVE ADDRESSED WHAT CONSTITUTES A "PROPERLY FILED APPLICATION" FOR PURPOSES OF TOLLING THE STATUTE OF LIMITATIONS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

At issue here is whether the AEDPA tolling provision applies to the filing of a successive petition for habeas relief in state court where state procedural rules bar review of the merits except under limited circumstances. As to that issue, it is respectfully argued that only the decision of a divided panel of the Eleventh Circuit is irreconcilable with the Second Circuit. *See Weekley v. Moore*, -- F.3d --, No. 98-4218, 2000 WL 217493 (11th Cir. February 24, 2000) (decided after the submission of the Petition herein). Respondent acknowledges that there is a split in authority between the Eleventh Circuit and the six other circuits that have interpreted the meaning of a "properly filed application" for purposes of the tolling provision. *See* Petition 10-13. However, the "wide split in authority" and "irreconcilable interpretations" to which Petitioner refers, *id.* at 9 and 10, respectively, misconstrue the holding of some of the circuit decisions and overstate their differences. Because the split among the circuits is largely illusory, and, with one exception, not inconsistent with the decision below, this Court's discretionary review is unwarranted in this case.

In the case at bar, the Second Circuit held that a successive post-conviction application for relief filed in a New York state court is "properly filed" under 28 U.S.C. § 2244(d)(2) for purposes of tolling the statute of limitations for respondent's federal habeas

petition even if the state court is procedurally barred from addressing the merits of the application. *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999). This decision is on "all fours" with three other circuits that specifically found the tolling provision applicable to the filing of even meritless successive state petitions for relief. *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998); *Villegas v. Johnson*, 184 F.3d 467, 469-70 (5th Cir. 1999); *McSheffrey v. Angelone*, No. 98-6519, 1999 U.S. App. LEXIS 2735 at *5 (4th Cir. February 23, 1999). Indeed, the Fourth and Fifth Circuits, and now the Second Circuit, expressly adopt the narrow interpretation of *Lovasz*, 134 F.3d at 148, that "'a properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing;" *see Villegas*, 184 F.3d at 467 (same); *McSheffrey*, 1999 WL 89403 at *2 ("[a] state application is properly filed if it complies with the state procedural requirements for successive collateral attacks on a conviction, such as the timeliness and proper place of filing"). Consistent with the Second, Third, Fourth and Fifth Circuits, the Tenth Circuit adopted the same narrow interpretation of "properly filed," without elaboration, in declining to toll the limitations period while a time-barred state habeas appeal was pending. *Hoggro v. Boone*, 150 F.3d 1223, 1226 n. 4 (10th Cir. 1998). *See* Petition at 11 (Tenth Circuit follows majority view).

The *Bennett* Court cited to the "majority view" in *Lovasz* and *Villegas, id.*, 199 F.3d at 121, and, quoting extensively from *Villegas*, adopted the majority's "narrow[]" construction of what constitutes a "properly filed" application. *Id.* at 122-23. Thus, it concluded, "'properly filed' [] mean[s] simply that an application for post-conviction relief recognized as such under governing state procedures has been filed." *Id.* at 123. By this construction, and in reliance on *Lovasz* and *Villegas*, the *Bennett* Court meant nothing more

than that federal courts should not inquire into the merits of an application for post-conviction relief to determine if it was "properly filed," and require only that the application meets the state's procedural rules, such as time and place of filing *Id.* at 122.

Petitioner characterizes the decisions of two other circuits as inconsistent with the majority view. *See* Petition at 11-12, *citing Dictado v. Ducharme*, 189 F.3d 889 (9th Cir. 1999); *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999). On close inspection, these decisions are in accord with the majority view that an application must meet the state's procedural requirements such as time and place of filing. In *Dictado*, a divided panel of the Ninth Circuit explicitly followed *Lovasz* in holding that a state petitioner's fourth post-conviction application for relief was not "properly filed" because it "did not comply with Washington's rules governing the time of filing." *Dictado*, 189 F.3d at 892 (emphasis added).

The *Dictado* Court stated that since *Lovasz*

> does not suggest that the standard for a 'properly filed' application under the AEDPA is more lenient than the relevant state procedural law (footnote 2 omitted) . . . [t]o hold that Dictado's procedurally defective application was 'properly filed' would require us to ignore the explicit holding of the Washington Supreme Court.

Id. The Washington Supreme Court had denied review, concluding that the application was both time-barred and successive. *Id.* at 891. Finding the time bar dispositive, however, the *Dictado* Court explicitly declined to address the other ground relied on by the state supreme court -- the specific issue in *Lovasz* -- whether a "frivolous but otherwise procedurally proper filing in state court is 'properly filed.'" *Id.* at 892, n. 2. Clearly, *Dictado* did not reach the question of the habeas petition's successiveness.

Nor is the Seventh Circuit's holding in *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999), inconsistent with the majority view. There, the Seventh Circuit found that a successive post-conviction motion was not "properly filed" where the state petitioner was denied leave to file by the appellate court as required by Indiana's procedural laws. The *Tinker* Court reasoned that the state filing requirement, like the federal requirements in 28 U.S.C. §§ 2244(a),(b), was not intended to invite state petitioners to file repeated petitions to toll indefinitely the deadline for their federal habeas action. *Id.*, 172 F.3d at 991. However, *Tinker* relied on the "screening mechanisms created by these statutes" to "determine when an application for post-conviction relief is proper (as in 'properly filed')." *Id.*

In ruling that an application is not "properly filed" if leave to file was denied, The *Tinker* Court does no violence to the majority view that a "properly filed application" must satisfy the state's procedural filing requirements. *Cf.* Petition at 12. Significantly, there was no pre-filing "screening mechanism" in the state procedural laws at issue in the other four circuit court decisions considering whether frivolous successive petitions were "properly filed applications" under 28 U.S.C. § 2244(d)(2). *See Lovasz*, 134 F.3d at 149 (42 Pa.Cons.Stat. Ann. § 9545(b)(1)); *McSheffrey*, 1999 WL 89403 at *1 n. 1 (Va.Code. Ann § 8.01-654(B)(2)); *Villegas*, 184 F.3d at 471 (Tex.Crim.P.Code.Ann. art. 11.07); *Bennett*, 199 F.3d at 121 (N.Y. McKinney's C.P.L. § 440.10).

Indeed, the *Villegas* Court, in *dicta*, contemplated pre-filing requirements like Indiana's in "hold[ing] that a properly filed application for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements." *Villegas*, 184 F.3d at 470. In the footnote which immediately follows, it states:

> By procedural filing requirements, we mean those prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review. Such filing requirements are not limited to the rules governing notice and the time and place of filing and may include, for example, a requirement that the petitioner obtain judicial authorization for the filing.

Id. at n. 2. (Emphasis added) The *Tinker* decision, therefore, broadens the majority view only in the sense of clarifying that a state's leave to appeal requirement, where applicable, is another procedural filing rule (like time and place of filing) needed for an application to be "properly filed."

Only the recent Eleventh Circuit decision in *Weekley v. Moore*, -- F.3d --, No. 98-4218, 2000 WL 217493 (11th Cir. February 24, 2000) cannot be reconciled with the majority view. In that case, petitioner filed three post-conviction motions in state court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. *Weekley*, 2000 WL 217493 at *1. The second and third motions were denied as successive, and these decisions were affirmed on appeal in state court. *Id.* The divided *Weekley* panel held that state court filings which the state courts dismissed as successive were not "properly filed" for purposes of the AEDPA tolling provision. *Id.* at *3. It deemed this holding an "extension" of its recent decision in *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000), which serves to encourage state court exhaustion while not allowing procedurally defective motions to toll the period for filing a federal habeas action. *Id.* In *Webster*, the Eleventh Circuit held that a third successive petition under Rule 3.850 was procedurally barred by the statute of limitations applicable to that rule. *Id.* at 1258. Even Petitioner here agrees that *Webster*, with its focus on "mere technical requirements concerning time and place of filing," reflects the majority of circuits' narrow interpretation of "properly

filed." Petition at 11.

The *Weekley* Court also relied on *Tinker* and *Dictado* to support its broader interpretation of "properly filed." However, it characterized *Dictado* as holding that "a state petition is not 'properly filed' if the petition is dismissed as successive under the state's procedural rules." *Id.* at *3. As illustrated above, the *Dictado* decision did not, in fact, reach this point. *Id.* 189 F.3d at 892 n. 2. The dissent in *Weekley* contended that the cases reflecting the majority view were "more persuasive" than *Dictado*, *Tinker* and *Webster*. *Id.* at *4. Further, echoing the majority view, it objected to any assessment on the merits of a post-conviction petition for purposes of determining whether it was "properly filed." *Id.*

As this analysis makes clear, only the recent *Weekley* decision issued by a divided panel of the Eleventh Circuit cannot be reconciled with the other circuit courts that have addressed a "properly filed application" for purposes of tolling the AEDPA's statute of limitations for state petitioners.

II REVIEW BY THIS COURT IS UNWARRANTED FOR THREE REASONS

A. STATES CAN INDEPENDENTLY LIMIT ACCESS TO FEDERAL COURT

Regardless of the federal courts' construction of the AEDPA's tolling provision, the states are nonetheless capable on their own of limiting state prisoners' ability to file successive petitions, which, in turn, limits their access to the federal courts. Even the majority view recognizes this obvious solution. Indeed, the Fifth Circuit in *Villegas*, almost anticipating the *Tinker* decision, noted in *dicta* that Texas could have chosen to limit the actual filing of successive petitions by requiring prior judicial authorization as opposed to simply limiting the availability of relief. *Villegas*, 184 F.3d at 471 and n. 3; *see Tinker*, 172 F.3d at 991 (AEDPA

limitations period not tolled by pendency of "leave to file" application that appellate court denied). States can also impose strict filing deadlines. *See, e.g., Webster*, 199 F.3d at 1258; *Hoggro*, 150 F.3d at 1226; *see also Bennett*, 199 F.3d at 123 ("states [can] place stricter restrictions on the filings that are the basis for tolling"), *quoting Villegas* 184 F.3d at 473. Consequently, states fearing an endless stream of frivolous habeas petitions can pass appropriate legislation without this Court's decision on the appropriate reach of the AEDPA's tolling provision.

B. 28 U.S.C.§ 2244(d)(2) APPLIES TO VERY FEW REMAINING PETITIONS

Review by this Court is unwarranted since few state petitioners seeking federal review of their convictions will be affected by any unifying construction of "properly filed" enunciated by this Court. Although Petitioner cites no basis for his contrary conclusion, Petition at 13-14, reason and logic dictate that there are only a meager number of state habeas cases still in the pipeline for which the AEDPA's one-year statute of limitations in § 2244(d)(2) has not yet run. State prisoners whose habeas claims accrued prior to the AEDPA's enactment had one year after the enactment -- to April 24, 1997 -- to file a federal habeas petition. *See, e.g., Ross v. Artuz*, 150 F.3d 97, 99 (2d Cir. 1998). Under the majority view, each day a state petition (even if frivolous) was "pending" tolled the one year clock. *See, e.g., Hoggro*, 150 F.3d at 1226 (calculating periods of tolling).

However, nearly two years have passed since the one year grace period expired. Assuming even lengthy delays in the state court system while state prisoners' post-conviction applications were "pending," the time to petition the federal courts for relief has certainly long

passed for most petitioners. [1] As the *Bennett* Court correctly found, even under the majority's narrow interpretation of "properly filed," state petitioners must be vigilant in pursuing their state claims to avoid a lapse of time under applicable filing requirements, and they cannot, therefore, "extend" "indefinitely" the running of the one-year clock. *Bennett*, 199 F.3d at 122.

C. THE COURT MUST DELVE INTO THE MERITS OF RESPONDENT'S STATE CLAIMS

Finally, were certiorari granted here, the Court would have to determine on the merits, and without guidance from any lower court, whether Mr. Bennett's second post-conviction application was properly barred as successive. In contrast to the record relied upon in the decisions of the other circuit courts, there is no indication in the record below of the basis or bases upon which the trial court relied in its summary denial of Mr. Bennett's second post-conviction application. Because Mr. Bennett filed his *pro se* petition in federal court without ever receiving a decision on his habeas application, there was no appeal.[2] In arguments before the Second Circuit, Respondent Artuz, reiterating the People's arguments in opposition to Mr. Bennett's state motion, *see* Petition at 6-7, asserted that Mr. Bennett's federal habeas claims

---

[1] Mr. Bennett's circumstances were unusual in that his state habeas petition was technically still "pending" at the time of his federal habeas petition. It cannot possibly be known how many cases remain "pending" nationwide under similar circumstances. States can, however, avoid this result with stricter procedural laws that, for instance, require state courts to issue decisions promptly and require state petitioners to file their appeal within a specified time of receiving notice of the trial court's decision even if not served with the decision. *See Bennett*, 199 F.3d at 120, *citing* N.Y.Ct. Rules § 670.12(b)(1) & (b)(2)(vi).

[2] Nor has the lower federal court addressed the viability of those claims. Upon remand to the District Court following the Second Circuit's ruling in this case, Mr. Bennett's federal habeas petition was stayed pending the outcome of the instant petition for a writ of certiorari. Mr. Bennett's counsel on appeal continues to represent him before the District Court.

were subject to a mandatory bar under state law because one claim had already been decided on direct review, and the other had a sufficient factual basis for direct review. *Bennett*, 199 F.3d at 121. Resolution of these matters, particularly in the absence of a state court decision articulating the basis for denial, would involve this Court in a potentially nettlesome inquiry into the merits underlying each of Mr. Bennett's state claims. *See Lovasz*, 134 F.3d at 148-49.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

(6)

No. 99-1238

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

TONY BRUCE BENNETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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June 22, 2000

PETITION FOR CERTIORARI FILED JANUARY 24, 2000
CERTIORARI GRANTED APRIL 17, 2000

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

DOCKET ENTRIES FOR DKT. NO. 98-CV-1274

2/20/98	Motion by Tony Bruce Bennett to proceed in forma pauperis, (ac)
2/20/98	PETITION for writ of habeas corpus; by Tony Bruce Bennett (ac)
2/20/98	MOTION by Tony Bruce Bennett for appointment of counsel.
2/20/98	Magistrate Caden has been selected by random selection to handle any matters that may be referred in this case. (ac)
3/6/98	LETTER dated 3.4.98 from Tony Bennett to Ms. Silber requesting that the Pro Se office furnish him with the necessary paperwork to appeal the Court's order denying his 2255. (tdh) [Entry date 03/09/98]
3/12/98	ORDER that the [2-1] petition is dismissed. (Signed by Judge Nina Gershon, dated: 2.25.98). (tdh)
3/25/98	Case closed. See Doc. No. 5. (tv)
3/25/98	JUDGMENT for Christopher Artuz against Tony Bruce Bennett, that petitioner take nothing of respondent; and, that the petition for a writ of habeas corpus is dismissed. () (aj1)

4/3/98	LETTER dated 3/31/98 from T. Bennett, to Ms. Volk, requesting information as to whether the court received his appeal. **Pro Se sent docket sheet. (mrm) [Entry date 04/06/98]
4/6/98	LETTER dated 4.2.98 from Tony Bennett to Mr. Heinemann inquiring about the status of his certificate of appealability. (Pro Se sent docket sheet). (tdh) [Entry date 04/08/98]
4/13/98	Notice of Appeal and certified copy of docket to USCA: [9-1] appeal (lizv) [Entry date 04/23/98]
4/13/98	NOTICE OF APPEAL by Tony Bruce Bennett Notice of Appeal and certified copy of docket sent appealing [6-1] judgment order, [5-1] order. IFP and Certificate of Appealability pending-Chambers notified. Service made by clerk. (lizv) [Entry date 04/23/98]
5/14/98	Certificate of Appealability granted; In Forma Pauperis on appeal granted as to Tony Bennett (signed by Judge Nina Gershon on 5/13/98). (lizv) [Entry date 05/15/98]
5/15/98	Certified and transmitted record on appeal to U.S. Court of Appeals: [9-1] appeal. This record consists of doc# 1-10. PLEASE NOTE: PETITION DISMISS-TIME BARRED; NO STATE COURT RECORDS. Acknowledgment requested. (lizv)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET ENTRIES FOR DKT. NO. 98-2452

5/18/98	Copy of notice of appeal and district court docket entries on behalf of Appellant Tony Bruce Bennett filed. (COAGR state - hc ; fee ifp) [98-2452] (1134)
5/18/98	Note: This appeal was PRO SE when filed. (1135)
5/18/98	Copy of district court order dismissing a writ of habeas corpus endorsed by Hon. Nina Gershon, dated 2/25/98, FILED. (1135)
5/18/98	Copy of district court Judgment for respondent against petitioner that petitioner take nothing of respondent and dismissing a petition for a writ of habeas corpus endorsed by Clerk of Court Robert C. Heinemann, dated 3/13/98, FILED. (1135)
5/18/98	Copy of district court order granting coa and ifp endorsed by Hon. Nina Gershon, dated 5/13/98 endorsed filed. (1135)
5/18/98	Record on appeal filed. (Original papers of district court.) Number of volumes: 1 (1135)
5/20/98	Letter requesting State Court proceedings and transcripts sent to Dennis C. Vacco for Appellee Christopher Artuz, Tony Bruce Bennett for

	Appellant Tony Bruce Bennett. State Court proceedings due on 6/1/98. (1135)
5/20/98	Letter requesting state court proceedings sent to SDNY/nyny Appeals Clerk. State Court proceedings due on 6/1/98. (pr26)
5/27/98	Order dated 5/27/98 appointing Ellen Beth Resnick, Esq. For appellant Tony Bruce Bennett pursuant to CJA filed. Voucher#: 0670562 [Copies mailed to counsel and AO] (AH) (pr26)
5/27/98	CJA voucher issued to counsel: Ellen Beth Resnick, Esq. for Tony Bruce Bennett (Voucher#: 0670562) [98-2452[(pr26)
5/27/98	Scheduling order no. 1 filed, appointing counsel: Ellen Beth Resnick, Esq. pursuant to CJA. Appellant/Pet brief joint appendix due on 7/27/98. Appellee/Respondent brief due on 8/26/98. Reply brief due on 8/10/98. Response to Anders brief due on 8/10/98. Argument as early as week of 10/12/98. (AH) (pr26)
5/27/98	Notice to counsel and appellant of cja scheduling order #1 dated 5/27/98. (pr26)
7/27/98	Appellant Tony Bruce Bennett motion to extend time to file appellant's brief FILED (w/pfs). [1225051-1] (1135)

7/29/98	Order FILED GRANTING motion for extended time [1225051-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 7/27/98. Extended appellant's brief due date is 8/25/98. Extended appellee's brief due date is 9/25/98. Extended argument week as early as 11/9/98. (1135)
7/30/98	Notice to counsel/pro se re: Order endorsed on motion granting an extention of time to file appellant's brief, dated July 30, 1998. (1135)
8/28/98	Stipulation to withdraw appeal without prejudice to reinstatement RECEIVED. (Stipulation is withdrawn without prejudice so that appellant may file motion with the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.) (pr28)
9/10/98	Letter (fax) received from John M. Castellan, dated 9/9/98 informing the Court that the Office of the Queens County District Attorney has been substituted as attorney for respondent. (pr28)
9/17/98	Order withdrawing appeal by consent without prejudice to reinstatement FILED. (SB) (pr28)
9/17/98	Certified copy of order dated 9/17/98 disposing of the appeal issued to district court. (pr28)
9/22/98	Notice to all parties of Stipulation filed on 9/17/98. (pr28)
9/22/98	Hold record until October 22, 1998. (pr28)

9/28/98	Certified copy of Stipulation withdrawing Appeal Without Prejudice receipt returned from the district court. (pr28)
2/24/99	Letter received from Ellen B. Resnick, dated 2/23/99 re: request that the appeal be reinstated and that a scheduling order issue. (pr28)
2/24/99	Papers (Affidavit to Reinstate Appeal) from Ellen B. Resnick, Esq. attorney for Appellant Tony Bruce Bennett received. (pr28)
2/24/99	Letter received from Ellen B. Resnick, Esq., dated 2/23/99 re: request that the appeal be reinstated and that a scheduling order issue. (pr28)
2/24/99	Appellant Tony Bruce Bennett motion to reinstate appeal FILED (w/pfs). [1349637-1] (pr28)
3/3/99	Order FILED GRANTING motion to reinstate appeal [1349637-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 2/24/99. (LG) (pr28)
3/4/99	Notice of all parties of Order dated 3/3/99. (pr28)

4/29/99	New CJA scheduling order number: 2 filed. New Appellant/Petitioner brief due date is 5/14/99. New appellee/respondent brief due date is 6/25/99. New response to Anders brief due date is 5/20/99. New argument week as early as 6/7/99. (pr28)
4/29/99	Notice to all parties of Scheduling Order #2 Issued. (pr28)
5/7/99	Appellant Tony Bruce Bennett defective certificate of service filed. Notice sent to party to correct by 5/14/99. (pr28)
5/21/99	Appellant Tony Bruce Bennett defective Amended Certificate of Service cured. Satisfy defective document response due. (pr28)
5/21/99	Appellant Tony Bruce Bennett brief and appendix with proof of service filed. Satisfy appellant's brief due. (pr28)
6/9/99	Appellee Christopher Artuz motion to extend time to File Appellee's Brief until July 9, 1999, FILED (w/pfs). [1414878-1] (pr28)
6/11/99	Order FILED GRANTING motion for extended time to file appellee's brief until July 9, 1999 [1414878-1] by Appellee Christopher Artuz, endorsed on motion form dated 6/9/99. Extended appellee's brief due date is 7/9/99. (SB) (pr28)

6/14/99	Notice of all parties of Order dated 6/11/99. (pr28)
7/12/99	Appellee Christopher Artuz brief filed with proof of service. (pr28)
7/12/99	Appellee Christopher Artuz brief RECEIVED. Problem: Motion to file Supplemental Appendix pending (volume I and II). (pr28)
7/12/99	Appellant Tony Bruce Bennett motion to allow Leave to Make motion out of time, to allow Leave to file supplemental appendix, FILED (w/pfs). [1438634-2] (pr28)
7/19/99	Order FILED GRANTING motion to allow leave to make motion out of time [1438634-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 7/12/99. GRANTING motion to allow leave to file Suppelemental Appendix [1438634-2] by Appellant Tony Bruce Bennett, endorsed on motion form dated 7/12/99. (SM) (pr28)
7/19/99	Appellee Christopher Artuz appendix or addendum filed. (Vol. I and II) (pr 28)
7/20/99	Notice of all parties of Order dated 7/19/99. (pr28)
7/27/99	Proposed for argument the week of 9/21/99. (ca93)
8/10/99	Set for argument on 9/24/99. [98-2452] (ca93)

8/24/99	Appellant Tony Bruce Bennett motion to allow waving Appearance at Oral Argument Due to Unavailiabity FILED (w/pfs). [1458950-1] (pr20)
9/3/99	Order FILED GRANTING motion to allow waiving the appearance at oral argument due to unavailability [1458950-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 8/24/99. (ca91)
9/8/99	Notice of counsel of the order GRANTING the motion for waiving the appearance at oral argument. (ca91)
9/24/99	Case heard before WINTER CH.J., KEARSE, MCLAUGHLIN C.JJ. (TAPE: #35) (ca95)
9/30/99	Letter received from A.D.A. Kathleen O'Leary pursuant to the Court's request for written argument on the issue of whether petitioner may successfully invoke title 28, Section 2244(d) (2) (b) of the United States Code. (pr20)
10/25/99	Judgment of the district court is REVERSE & REMANDED by published signed opinion filed. (RKW) [98-2452] (pr28)
10/25/99	Judgment filed. [Entry Date: 10/26/99] (pr28)
11/8/99	Note: The OPINION PRICE is $3.00 (rek)
11/22/99	Judgment MANDATE ISSUED. (pr28)

11/22/99	Notice of all parties of Mandate Issued on 11/22/99. (pr28)
1/20/00	Record on appeal RETURNED to lower court. No. of volumes: 1 (ref)
1/31/00	Notice of filing petition for writ of certiorari for Appellant Tony Bruce Bennett dated 1/27/00 filed. Supreme Court#: 99-1238. (pr28)
3/23/00	Affidavit of service filed by Ellen B. Resnick, Esq. in support of my request for payment on Voucher Number 0670562. (pr28)
4/21/00	Certified copy of Supreme Court order GRANTING petition for writ of certiorari [1553949-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 1/31/00 dated 4/17/00. (pr28)

To be argued by
Donald E. Gilbert

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Indictment No.
842/83

TONY BENNETT,

Appellant.

APPELLANT'S BRIEF

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STATEMENT UNDER RULE 5531

1. The indictment in the Grand Jury was 842/83.

2. The full names of the original parties were:

The People of the State of New York
-against-
Tony Bennett - defendant

3. The action was commenced in the Supreme Court of the State of New York, Queens County.

4. The defendant was convicted after trial of the crimes of attempted murder in the first degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree and unauthorized use of a vehicle and he was sentenced on September 25, 1984 on each of the counts of attempted murder in the first degree to 15 years to life, on the count of criminal possession of a weapon in the second degree 5 years to fifteen years, on each of the counts of reckless endangerment in the first degree 2 1/3 years to seven years, on the count of criminal possession of stolen property in the first degree 2 1/3 years to seven and on the count of unauthorized use of a motor vehicle 1 year, all sentences to run concurrently.

5. This appeal is from the judgment rendered on September 25, 1984 convicting the appellant of the crimes of attempted murder in the first degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree and unauthorized use of a

motor vehicle and the sentences imposed thereon.

6. The appellant has been granted leave to appeal as a poor person on the original record. The appendix method is not being used.

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered against the appellant on March 27, 1994 in the Supreme Court, Queens County, convicting the defendant after trial of the crimes of attempted murder in the first degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree and the unauthorized use of a motor vehicle and the sentence imposed thereon on September 25, 1984 of 15 years to life on each count of attempted murder in the first degree (2 counts), 5 to 15 years on the count of criminal possession of a weapon in the second degree, 2 1/3 to 7 years on each count of reckless endangerment in the first degree (2 counts) on the count of criminal possession of stolen property in the first degree, 2 1/3 to 7 years and on the count of unauthorized use of a motor vehicle 1 year, all sentences to run concurrently.

Timely notice of appeal was filed and this Court granted appellant leave to appeal as a poor person.

No order pursuant to C.P.L. § 460.50 is outstanding and the appellant is presently incarcerated.

STATEMENT OF FACTS

WADE HEARING

DET. DANIEL COLLINS: On February 23, 1983 he was conducting the investigation of the attempted murder of officers Perham and Cleaver (H-9).* He set up a photo array of 8 pictures for officers Perham and Cleaver to view (H-13). They were shown the photos at separate times. They picked the defendant's photo (H-14).

He then conducted a lineup with the defendant and five other men. Both officers picked #3 the defendant (H-15). Both officers said the defendant was in the back seat of the car and shot at them (H-19, 20).

He had first heard of Tony Bennett a couple of years ago (H-20). The defendant and his photo were known to him (H-22). The defendant was arrested by another officer after he had talked to him and given him the defendant's name (H-23).

He had gotten a list of names from other officers and he got their photos and put them in the array (H-24). The defendant's name was typed on the back of his photo (H-33).

Officer Perham looked at the photos for less than minute and he picked the defendant (H-34). The defendant's photo was in the same place when the array was viewed by Officer Cleaver. Officer Cleaver took less time to identify the defendant than did officer Perham (H-38).

A lineup was then held between 9:20 p.m. and 9:35 p.m.

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* (H-9) refers to hearing minutes.

(H-42). Officers Cleaver and Perham two days after the incident both said that they were not sure if they could make an identification (H-56). The description that they gave the night of the incident was the one was taller than the other and that the shorter was in the back. They were between 19 and 25 years old (H-73, 74).

OFFICER WILLARD CLEAVER: He testified that on February 23, 1983 he was assigned to the 113th Precinct (H-4). The defendant was in the rear of the car (H-8). He had never seen the defendant before the shooting (H-32). The description he gave was male black, 16 to 17 years old with short cropped hair (H-36).

At the time of the incident they were in plain clothes in an unmarked car (H-39). During the pursuit of the car the closest they got to it was three feet. The defendant fired two shots (H-41). They were ten feet away when he fired (H-42).

He and his partner returned the fire. The defendant's car then went into an embankment. When the defendant got out of the car he was 45 feet away and it was dark out (H-45). Both cars were in motion at the time the shots were fired (H-47). He couldn't see the defendant's face when he got out of the car (H-57).

OFFICER KEVIN PERHAM: He testified that when he first saw the car there were four men in the car. He had never seen the defendant before and he did not know his name (H-59). He didn't see the defendant then. They responded to another call and then came back and followed the car. At that time there were three men in the car. The car stopped and the third person got out. The car was not speeding (H-61). As they pulled up behind the car it sped away (H-63). The defendant was in the

rear and he had a gun in his left hand (H-66).

The defendant opened the rear door on the driver's side while still seated in the car and fired the gun (H-68). The defendant was thirty feet from when he exited the car. The only lighting was their headlights (H-69). The defendant ran into the woods and he lost sight of him (H-70).

He picked the defendant's picture in a few seconds (H-76). He knew that someone had been arrested when he viewed the lineup (H-78). He looked at only two pictures before he picked the defendant who was #3 (H-79). The incident occurred on February 1, 1983, after midnight (H-83).

The defendant rested on the record (H-85).

COURT'S DECISION

The Court in its decision found that the photo array was not suggestive and did not taint the subsequent lineup. The Court also found that the lineup was not suggestive or conducive to irreparable misidentification. It denied the defendant's motion to suppress the identification and held that the lineup testimony was admissible at trial. (See Court decision of January 30, 1984).

It was stipulated that the defendant had no right to possession of the car (H-17).

TRIAL

OFFICER WILLIARD CLEAVER: He testified that on January 31, 1983 he was assigned to the 113th Precinct and was

working the 5:30 p.m. to 2:00 a.m. tour (T-68).* His partner was Officer Perham (T-69). At midnight they observed a blue chevrolet parked at a gas station (T-70). There were four men in the car when they first saw it (T-71).

They received a radio run and went to the location but it was unfounded. They then went back to the blue car and they saw it heading north and they followed it. They pulled up behind the car when it stopped to let a man out. There now was the driver and one man in the rear (T-71).

When they put the red light on the car sped away and they chased it (T-75). The male in the back held up a silver revolver. He could see his face, it was the defendant (T-77). The male in the back fired two shots. He could see a profile of his face (T-78).

When the defendant got out of the car he had a gun in his hand (T-80). The incident occurred at 2:00 a.m. (T-82). On February 23rd he identified the defendant in a lineup (T-100).

He had never seen the defendant before February 1st. It was 4 to 5 minutes from the time the case started till it ended (T-106). He described the defendant as a male black, 16 or 17 years old with short cropped hair (T-111).

He admitted that he told the firearms control board that the defendant was 60 feet away when the shots were fired (T-113). He could not see the defendant's face when he got out of the car (T-116). The defendant had the gun in his rind hand however in his memo book he said that he had it in his left hand (T-118).

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* (T-68) refers to trial minutes.

He had received a communication that the car was wanted in two robberies (T-120). It was dark out and the lighting changed in the course of the case (T-133). In his report he stated that he may not be able to identify the perpetrators (T-154). The defendant was born 12/22/65 and is 21 years old (T-176).

DET. DANIEL COLLINS: He testified that he was assigned to the 105th Precinct on February 23, 1983 (T-180). He was assigned to investigate this case (T-188).

A wine bottle was found in the car. The car was dusted for prints and the defendant's prints were not found in the car (T-194). The car had been used in two holdups that night. The defendant was not described as a participant in these holdups (T-195).

On February 3rd both Officers Cleaver and Perham told him that they could not identify the perpetrators (T-199). He didn't have either of them look at mug books (T-205). Some prints were taken from the car but they did not match the defendants' (T-206). February 23rd was the first time that they went out to look for suspects (T-215).

OFFICER KEVIN PERHAM: He started work on January 31, 1983 with Officer Cleaver at about 5:30 p.m. (T-240). There were four men in the car when they first saw it (T-242).

During the chase the defendant turned around a couple of times and he saw his face (T-249). He had never seen the defendant before (T-250). He picked the defendasnt out of the lineup (T-262). He didn't notice any fog on the defendant's car windows (T-262).

DEFENDANT'S CASE

JULIAN ISHMAEL: He testified that he was 18 years old and that he had never been convicted of a crime (T-283). He knows the defendant and they had been playing basketball the morning of January 31st at the Center at P.S. 52 (T-284). They placed until 5:00 p.m. or 6:00 p.m. when the center closed (T-285). The defendant then went with him to his house (T-286).

They were drinking and watching T.V. and they finished 3/4 of a bottle (T-287). The defendant never left the house. When the defendant was leaving they heard shots, saw flashing lights and went to the corner to see what happened. They were standing there talking to a police officer and another man (T-288).

They were there about half an hour and then went back to the house. They had seen a blue car halfway down a hill (T-298). They finished the bottle and the defendant decided to sleep over and he slept in his sister's room. He got up around 7:30 a.m. and he went to school and the defendant went to work (T-290).

The defendant and Mr. Chisholm did not associate with each other (T-292).

ELIAS MAHAMED: He was presented as a witness but was not allowed to testify. The district attorney stated that he had only been served with a notice of alibi for one witness. The defense claimed that he was not an alibi witness or a character witness (T-312). He had seen the defendant and Ishmael together. The district attorney claimed that this was bolstering and nothing new (T-313).

The Court held that the defense could not use him as a witness even though the district attorney had been told a week ago that he was going to testify. The court stated that he was an alibi witness. The defense took an exception (T-314). The witness would have testified that he saw Ismael and the defendant together in the crowd at6 the end of the chase (T-315). The Court held that since no alibi notice was given he could not testify as an alibi witness (T-322).

TONY BENNETT: He testified that he was 21 years old, married and has an 18 month old daughter. He has been working for Dobbs Food Service Caterers for eight months. He has never been convicted of a crime (T-323, 324).

He had previously worked for the New York City Department of Personnel, Priority Air Freight, Darnell Fashions, Mitchum Chemists and the Triborough Bridge and Tunnel Authority. He knows Mr. Ismael and Mr. Chisholm (T-325).

He had testified for the people against Ronald Chisholm, the brother of Derrick Chisholm in 1979 because he had shot one of his friends (T-326). He and Mr. Chisholm have had seven or eight fights. They had a fight the previous Monday on the subway and they were both arrested which is why they were unable to come to Court (T-327)

He arrived at Mr. Ishmael's house before 7:00 p.m. (T-329). They were drinking wine or rum, he is not sure which (T-330). He dozed off and woke up about 11:30 p.m. (T-331). It was 20 degrees outside and he was wearing a 3/4 length coat. He is right handed. (T-332)

When they were leaving the house they heard shots. They walked to the park to see what happened (T-333). He saw

police officers crouched behind car doors with their guns drawn. He met Mr. Mahamed and talked to him. Mr. Mahamed was standing in front of his house with a bathrobe on. (T-334)

We were also talking to Officer Jenkins and we watched the police go into the weeds to search and we then went back to the house to finish the wine (T-336). This was a rare occurrence in our neighborhood. I stayed in Mr. Ismael's house that night. (T-337)

Since he had testified against Ronald Chisholm Detectives Collins and Milonesi have come to this house to ask him questions about Ronald Chisholm (T-338). Every time that they saw him they would say "what are the Chisholms doing? You know, tell me. You know come on, come on. I'm telling you, if I get the opportunity I'm going to burn them". (T-338)

Even when I was driving my car they would pull me over and ask me, they told me "all right, I got it arranged with some people out in Nassau County, right, there's some guys that have been doing some robberies." They said they would pay me $100.00 if I picked out the pictures and give them the names. (T-339)

DERRICK CHISHOLM: He testified that he was 20 years old and that he really didn't know the defendant. He only saw him in the streets (T-384). He and the defendant had three or four fist fights previously and they had a fight last week coming to Court (T-388). He was not in the car with the defendant on February 1, 1983. (T-389)

The people and the defense rested (T:404). The defendant's motion to dismiss was denied (T-408, 409)

VERDICT

The defendant Derrick Chisholm was found not guilty on all counts. (T-600)

The defendant, Tony Bennett, was found guilty of the following counts: Count one - attempted murder in the first degree; Count two - attempted murder in the first degree; Count Five - criminal possession of a weapon in the second degree; Count six - reckless endangerment in the first degree; Count seven - reckless endangerment in the first degree; Count eight - criminal possession of stolen property in the first degree, and Count nine - unauthorized use of a vehicle. (T-601, 602)

SENTENCE

A letter from Alfred Seaman was submitted, which reads as follows:

> "I, Alfred Seaman, hereby gives valid information reference to an alleged crime being committed on 1/31/82 - February 1, 1982 two police officers were allegedly shot at behind J.H.S. 231. The person who is charged with this crime is Tony Bennett which could not have been in the blue car because on this particular night, I saw Ronald Cephaus, Ricky Whitehurst, Tony Bennett, and Julian Ismael parked on Rockaway Boulevard by a gas station sitting in a car. A few months later I saw Tony and Ismael get out of the car and leave. R.C. Lil Ricky remained inside the car. A few moments later the police approached the car and R.C.

sped off and police gave chase". (S-3)*

The district attorney gave Mr. Seaman a polygraph test and it was found that his performance was highly deceptive. The district attorney then interviewed Rose Powell, the defendant's sister who told him that on 1/31/82 about 10:15 p.m. she was coming from the store and she saw Tony and Ishmael and she told Tony his wife had called. He said, "I'm going to Ishmael's house." She did not know where he was from 10:30 p.m. to 7:00 a.m. (S-5).

The Court held that there was nothing before him upon which he could grant the defendant's motion as to newly discovered evidence or Mr. Mahamed the alibi witness (S-7). The defendant still claims that he is innocent (S-9).

The Court stated that - "I am not completely satisfied that I know everything here that I should know" (S-10).

The district attorney asked the Court to impose the minimum sentence of 15 years to life before of the defendant's character and his supportive family (S-12).

The Court stated that it was "quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was and the police were just as firmly convinced that Chisholm was as Bennett was" (S-13).

The Court sentenced the defendant on two counts of attempted murder in the first degree to 15 years to life on each count. On the count of criminal possession of a weapon in the second degree 5 to 15 years. On the two counts of reckless

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* (S-3) refers to sentence minutes

endangerment in the first degree 2 1/3 to 7 years on each count. On the count of criminal possession of stolen property in the first degree 2 1/3 to 7 years and on the count of unauthorized use of a motor vehicle 1 year. All sentences to run concurrently.

POINT I

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW MR. ELIAS MAHAMED TO TESTIFY FOR THE DEFENSE BECAUSE TIMELY NOTICE OF ALIBI WAS NOT SERVED.

Mr. Elias Mahamed was presented as a witness for the defense but he was not allowed to testify. The district attorney stated that he had only been served with a notice of alibi for one witness.

The defense claimed that he was not an alibi witness or a character witness (T-312). He would testify that he had seen the defendant and Ishmael together the night of the crime. The district attorney claimed that this was bolstering and nothing new (T-313).

The Court held that the defense could not use him as a witness even though the district attorney had been told a week ago that he was going to testify. The Court stated that he was an alibi witness. The defense took exception (T-314).

The witness would have testified that he saw Ishmael and the defendant together in the crowd at the end of the chase (T-315). However, the Court held that since no alibi notice was given he could not testify as an alibi witness (T-322).

This witnesses' testimony was crucial to the defense especially in view of the fact that both Mr. Ishmael and the defendant testified that they were together in the crowd. His testimony, if it had been admitted, could well have changed the jury verdict from guilty to not guilty.

The district attorney had known a week ago that the defense was going to call him as a witness. There was no surprise or prejudice to the district attorney. The People made no application for an adjournment. The witness was kept on call until the next day, if the People wished to question him or to call him as their witness (T-365-367). The People failed to do so.

Permitting an unlisited alibi witness to testify where, arguably, he is not an alibi witness is in accord with the long established rule that statutes which infringe on fundamental rights must be narrowly construed. See Smith v. United States, 360 U.S. 1; People v. Trowbridge, 305 N.Y. 471; People ex rel. Cosgriff v. Craig, 195 N.Y. 190.

Refusal to permit defendant's witness to testify violated his constitutional right to call witnesses in the presentation of his defense. People v. Cuevas, 67 A.D.2d 219; Chambers v. Mississippi, 410 U.S. 284; In re Oliver, 333 U.S. 257; People v. Foy, 32 N.Y.2d 473.

C.P.L. § 250.20(3) allows the Court in its discretion to receive testimony where an alibi notice was not given. The Court must grant the People upon application an adjournment of up to three days. The Court should have followed this statutory provision and its failure to do so constituted reversible error especially where the district attorney knew a week ago that the witness would be called and the People requested no adjournment.

The Court should not refuse to permit an alibi witness to testify before he was not named in the notice of alibi as a sanction for defendant's failure to comply with the statute. People v. Morales, 43 A.D.2d 917 aff'd, 37 N.Y.2d 262. In the absence of a showing of undue prejudice to the People the failure to make timely notice is not a fatal defect. People v. Peterson, 96 A.D.2d 871.

There was no showing of surprise or undue prejudice to the People and the People did not request an adjournment. In view of these facts the Court's refusal to let the witness testify was an abuse of discretion which constituted reversible error.

The judgment of conviction should be reversed and a new trial ordered.

POINT II

THE JUDGMENT OF CONVICTION MUST BE REVERSED BECAUSE THE PEOPLE FAILED TO PROVE THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

At the Wade hearing, Detective Collins testified that wo days after the incident both Officer Cleaver and Officer Perham told him that they were not sure if they could make an identification (H-56). The description that they gave the night of the incident was that one was taller than the other and that the shooter was in the back. They were between 19 and 25 years old (H-73, 74).

Officer Cleaver had never seen the defendant before the shooting (H-32). The description he gave was male black 16 to 17 years old with short cropped hair (H-36), (T-111). The

perpetrator was 45 feet away when he got out of the car and it was dark out (H-45). He told the firearms control board that the defendant was 60 feet away when the shots were fired (T-113). In his report he stated that he may not be able to identify the perpetrators (T-154). He couldn't see the perpetrator's face (H-57).

Officer Perham had never seen the defendants before (H-59). The defendant was in the rear of the car and he had a gun in his left hand (H-66). At the trial Officer Cleaver stated that the defendant had the gun in his right hand however in his memo book he said that he had it in his left hand (T-118).

The car chase lasted 4 to 5 minutes (T-106) and it occurred at 2:00 a.m. (T-82). The distance between the cars and the lighting varied during the chase which went around several corners (T-133).

A wine bottle was found in the car. The car was dusted for prints and the defendant's prints were not found in the car (T-194). Although some prints were taken from the car (T-206). The car was used in two holdups that night but the defendant was not described as a participant in these holdups (T-195).

Mr. Ishmael who testified for the defense stated that he was 18 years old and had never been convicted of a crime (T-283). The defendant was with him playing basketball on January 31st. They then went to house and they stayed there drinking and watching T.V. (T-287).

When the defendant was leaving they heard shots, saw flashing lights and went to the corner to see what happened. They stood there talking to a police officer and another man (T-

288). About a half hour later they went back to the house (T-289). They finished the bottle and the defendant stayed over and he never left. They got up at 7:30 a.m. and he went to school and the defendant went to work (T-290).

The defendant and Mr. Chisholm did not associate with each other (T-292). The People in no way controverted his testimony.

The defendant who testified in his own behalf stated that he was 21 years old, married and had no 18 month old daughter and was gainfully employed (T-323, 324).

He had testified for the People against Ronald Chisholm, the brother of Derrick Chisholm in 1979 because he had shot one of his friends (T-326). He and Mr. Chisholm have had seven or eight fights. They had a fight the previous Monday on the subway and they were both arrested which is why they were unable to come to court (T-327).

He arrived at Mr. Ishmael's house before 7:00 p.m. (T-329). He is right handed (T-332). When they were leaving the house they heard shots. They walked to the park to see what happened (T-333). He met Mr. Mahamed and talked to him (T-334).

He also spoke to Officer Jenkins. They then went back to the ho use (T-336). He stayed in Mr. Ishmael's house that night (T-337).

Derrick Chisholm testified that he really didn't know the defendant. He only saw him in the streets (T-384). He and the defendant had three or four fist fights previously and they had a fight last week coming to Court (T-338). Mr. Chisholm was

found not guilty on all counts (T-600).

The court itself had some doubts as shown by the following statements made by the Court at the sentencing:

> "I am not completely satisfied that I know everything here that I should know" (S-10).
>
> "Quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was the police were just as firmly convinced that Chisholm was as Bennett was" (S-13).

The defendant still claims that he is innocent (S-9). The description of the perpetrator by the police was a male black 16 years old (T-111). The defendant was 21 years old and taller. The jacket found in the back of the car was too large for the defendant.

The incident occurred on February 1st at about 2:00 a.m. On a cold February night the rear windows of the car would have fogging on them obscuring the identity of the occupants. In view of this and the fact that it was dark the police could not have identified the defendant. Although fingerprints were found in the car they were not the defendant's prints.

There clearly was a reasonable doubt as to the defendant's guilt and the jury's failure to resolve this doubt in the defendant's favor constituted reversible error.

C.P.L. § 70.20 provides that no conviction of an offense by verdict is valid unless based upon trial evidence which is

legally sufficient and which establishes beyond a reasonable doubt every element of such offense and that the defendant's commission thereof.

The United States Supreme Court has held that the due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 358.

The presumption of innocence means that the burden is always on the prosecution to establish the accused's guilt beyond a reasonable doubt. Richardson on Evidence 10th Ed. § 61.

The Supreme Court of the United States has defined a reasonable doubt as an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any such matter of like importance would hesitate to act because of such doubt as you are conscious of having, that is reasonable doubt of which the defendant is entitled to have the benefit. Holt v. United States, 218 U.S. 245.

There clearly was a reasonable doubt as to the defendant's guilt and the jury verdict was in error.

The judgment of conviction should be set aside and a new trial ordered.

POINT III

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE DEFENDANT'S C.P.L. § 330.30 MOTION TO SET ASIDE THE VERDICT BECAUSE OF NEWLY DISCOVERED EVIDENCE.

At the time of sentencing the defendant made a motion pursuant to C.P.L. § 330.30 to set aside the verdict on the grounds of newly discovered evidence.

A letter from Alfred Seaman was submitted, which reads as follows:

> "I Alfred Seaman, hereby gives valid information in reference to an alleged crime being committed on 1/31/82 - February 1, 1982 two police officers were allegedly shot at behind J.H.S. 231. The person who is charged with this crime is Mr. Tony Bennett, which could not have been in the blue car because on this particular, I saw Ronald Cephaus, Ricky Whitehurst, Tony Bennett and Julian Ishmael parked on Rockaway Boulevard by a gas station sitting in a car. A few moments later I saw Tony and Ishmael get out of the car and leave R.C. Lil Ricky remained inside the car. A few moments later the police approached the car and R.C. sped off and police gave chase" (S-3).

This newly discovered evidence would exonerate the defendant. The fact that Mr. Seaman was given a polygraph test which was not highly favorable does not in any way detract from

this evidence which the jury should have heard.

The jury should also have heard the testimony of Rose Powell that she saw the defendant on the night in question at about 10:15 p.m. and he was with Ishmael. The defendant told her that "I'm going to Ishmael's house" (S-5).

The testimony of these two people coupled with the testimony of Mr. Mahamed, if he had been allowed to testify and the testimony of the defense witnesses would clearly have caused the jury to render a verdict other than the guilty verdict.

The Court denied the defendant's motion (S-7) in spite of the fact that it was not completely satisfied that it knew everything that it should know (S-10) and that it was quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was and the police was just as firmly convinced that Chisholm was as Bennett was (S-13).

C.P.L. § 330.30(3) provides that where new evidence has been discovered and is of such a character to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant, the Court may set aside the verdict.

There clearly were grounds, which if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law. See People v. Collins, 72 A.D.2d 431. In such a case a new trial is the proper remedy. People v. Barberas, 92 A.D.2d 871.

The Court committed reversible error when it denied the motion without conducting a hearing. People v. Stokes, 83

A.D.2d 968; People v. Daniels, 48 A.D.2d 905.

The judgment of conviction should be reversed and a new trial ordered.

POINT IV

THE TWO CONVICTIONS OF ATTEMPTED MURDER IN THE FIRST DEGREE MUST BE REVERSED BECAUSE THE PEOPLE FAILED TO PROVE INTENT TO CAUSE DEATH BEYOND A REASONABLE DOUBT AND THE PEOPLE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KNEW THEY WERE POLI CE OFFICERS.

Penal Law § 125.27(1)(a) (i) requires that there must be intent to cause death and that the defendant knew or reasonably should have known that the victim was a police officer.

At the time of the incident the police officers were in plain clothes and were in an unmarked car (H-39). The defendant and the driver could very well have thought at 2:00 a.m. that there were two men who were trying to rob them.

It was alleged that in the course of the chase the defendant fired two shots. The officers were not hit and there was no proof that the bullets even hit their car. It is conceivable that the defendant could have fired in the air only with intent to scare off his unknown pursuers which would amount to reckless endangerment in the first degree.

The People must prove the defendant's intent to kill.

People v. Hernandez, 78 A.D.2d 554. The People must also prove that the defendant knew that the intended victims was a police officer. People v. Cherry, 412 N.Y.S.2d 35.

The People failed to prove intent to kill beyond a reasonable doubt and also failed to prove that the defendant knew the victim was a police officer beyond a reasonable doubt. The convictions for attempted murder in the first degree must be reversed.

POINT V

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO SUPPRESS THE IDENTIFICATION OF THE DEFENDANT.

Det Collins set up a photo array of 8 pictures for Officers Perham and Cleaver to view (H-13). They were shown the photos and they picked the defendant's photo (H-14). He then conducted a lineup with the defendant and five other men and both officers picked the defendant (H-15).

The defendant and his photo were known to him (H-22). The defendant was arrested by another officer after he had talked to him and given him the defendant's name (H-23).

Det Collins was conducting the investigation of the attempted murder of Officers Perham and Cleaver. He had heard of the defendant a couple of years ago (H-20). The defendant's name was typed on the back of his photo (H-33).

Officer Perham looked at the photos for less than a minute (H-34). The defendant's photo was in the same place

when the array was viewed by Officer Cleaver who took less time to identify the defendant than did Officer Perham (H-38).

Both officers two days after the incident stated that they were not sure that they could make an identification (H-56). The description that they gave the night of the incident was that one was taller than the other, the shooter was in the back and they were between 19 and 25 years old (H-73, 74).

Officer Cleaver who had never seen the defendant before the shooting described him as a male black, 16 to 17 years old with short cropped hair (H-36). Both cars were in motion and it was dark outside (H-45).

Officer Perham had never seen the defendant before the incident (H-59). The only lighting was their headlights, (H-69) yet he picked the defendant's picture in a few seconds (H-76) after only looking at two of the eight pictures (H-79). Prior to the time he looked at the lineup he knew that someone had already been arrested (H-78), in fact he was arrested at 6:00 p.m. and the lineup was at 9:30 p.m. The incident took place on February 1, 1983 after midnight (H-83).

The Court held that the photo array was not suggestive and that it did not taint the subsequent lineup. The Court also found the lineup was not suggestive and that the lineup testimony was admissible at trial. (See Court decision of January 30, 1984).

Officer Cleaver told the firearms control board that the defendant was 60 feet away when he fired the shots (T-113). He couldn't see the defendant's face when he got out of the car (T-116).

The photo array and the subsequent lineup were highly suggestive and tainted and therefore the lineup identification and the in court identification, which was the "fruit of the poisonous tree" should have been suppressed. There was no independent source for an in court identification.

Both officers two days after the incident admitted that they were not sure they could make an identification. It is 22 days after the incident when Detective Collins is in charge of the investigation that they can all of a sudden identify the defendant's photo and the defendant.

Det Collins had the defendant arrested hours before the identification took place. He specifically put the defendant's picture, with his name on the back in the same place in the photo array when the officers viewed it. The officer knew an arrest had been made prior to the identification which clearly put pressure on them to identify someone. All of this was highly suggestive.

It is inconceivable under the facts of the chase that the officers could have seen the defendant. The cars were traveling at high speeds and turned around a number of corners. It was dark out and it was cold and there must have been fogging of the rear window. Neither officer had seen the defendant before this incident. When the two shots were fired, which would have only taken a couple of seconds the police car was 60 feet6 away. They ducked and returned the fire. Neither one of them could see his face when he exited the car.

The identification under the circumstances was unbelievable and the photo array was suggestive and tainted, thus the subsequent lineup should have been suppressed and the Court's failure to do so constituted reversible error.

An appellate court should "refuse to credit testimony which has all appearances of having been patently tailored to nullify constitutional objections." People v. Garafolo, 44 A.D.2d 86 at 88.

The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced into the case. People v. Garafolo, 44 A.D.2d 86; People v. Auletta, 88 A.D.2d 867; People v. Smith, 77 A.D.

The due process clause of Fourteenth and Fifth Amendment prohibits an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. Kirby v. Illinois, 406 U.S. 682; Neil v. Biggers, 409 U.S. 188; Manson v. Brithwaite, 432 U.S. 98.

The officers photo identification was suggestive, tainted and unbelievable and therefore the subsequent lineup was tainted and the admission of this evidence at trial was in violation of the defendant's constitutional rights and constitutes reversible error.

The judgment of conviction should be reversed and a new trial ordered.

APPELLANT'S POINT

POINT VI

THE SENTENCE IMPOSED WAS HARSH AND EXCESSIVE AND SHOULD BE REDUCED.

The district attorney asked that the minimum sentence be imposed (S-12). The defendant was a first offender.

The Court sentenced the defendant on the two counts of attempted murder in the first degree to 15 years to life on each count. On the count of criminal possession of a weapon in the second degree 5 to 15 years. On the two counts of reckless endangerment in the first degree 2 1/3 to 7 years, on each count. On the count of criminal possession of stolen property in the first degree 2 1/3 to 7 years and on the count of unauthorized use of a motor vehicle 1 year. All sentences to run concurrently.

The defendant was convicted of attempted murder in the first degree. This is a class B felony under Penal Law § 70.02(1)(a). It is not an armed felony as defined in C.P.L. 1.20(4). Therefore, under Penal Law § 70.02(4) the minimum sentence should have been 8 1/3 and not 15 years. People v. Lawrence, 97 A.D.2d 718.

In view of the defendant's good background and the fact that he was a first offender the minimum sentence should have been imposed.

Retribution is no longer the dominant objective of the criminal law. Zett, New York Criminal Practice Vol 6, p. 45. New York today follows the prevalent modern philosophy of

penology that the punishment should fit the offender and not merely the crime. Reformation and rehabilitation of offenders has become the important goals of criminal jurisprudence. Williams v. New York, 337 U.S. 241; People v. Scafo, 77 A.D.2d 668. The defendant's potential for rehabilitation must be considered. People v. Berghordt, 17 A.D.2d 912; People v. Masher, 24 A.D.2d 47.

The Appellate Division in the in exercise of its discretion has the power to modify or reduce an excessive sentence, People v. Record, 51 A.D.2d 677; People v. Brovender, 39 A.D.2d 587, even if legally permissible. People v. Nichols, 30 A.D.2d 635; People v. Best, 77 A.D.2d 836.

The sentence imposed was harsh and excessive and the sentence should be reduced to minimum sentence allowable by law.

CONCLUSION

1. The Court's refusal to allow Mr. Mahamed to testify for the defense because a notice of alibi was not served constituted reversible error.

2. The conviction must be reversed because the people failed to prove the defendant's guilt beyond a reasonable doubt.

3. The denial of the defendant's C.P.L. § 330.30 motion to set aside the verdict because of newly discovered evidence constituted reversible error.

4. The convictions for attempted murder must be set aside because the People failed to prove intent to cause death and knowledge that they were police officers beyond a

reasonable doubt.

5. Failure to suppress the tainted identification constituted reversible error.

6. The sentence imposed was harsh and excessive and should be reduced.

Respectfully submitted,

DONALD E. GILBERT

(EXHIBIT OMITTED)

AFFIRMATION OF MAILING

DONALD E. GILBERT, ESQ., an attorney admitted to practice in the Courts of the State of New York, and not a party to this action, under penalty of perjury says:

1. I am the attorney for Tony Bennett, the defendant-appellant in this action.

2. On the 28th day of March 1986, I served the within appellant's brief, note of issue and trial minutes upon the Hon. John Santucci, District Attorney, Queens County, attention Appeals Bureau, addressed to 125-01 Queens Boulevard, Kew Gardens, New York, by ordinary mail by giving the same in a postpaid wrapper, a proper addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

March 28, 1986

_____

Donald E. Gilbert

Argued by: Seymour Roth

Request: 10 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

TONY BENNET

Defendant-Appellant.

RESPONDENT'S BRIEF

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Indictment Number 842/83
(Queens County)

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Argued by: Seymour Roth
Request: 10 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

TONY BENNETT, :

Defendant-Appellant. :

RESPONDENT'S BRIEF

Preliminary Statement

This is an appeal from a judgment entered in the Supreme Court, Criminal Term, Queens County on September 25, 1984, convicting defendant, after a jury trial of attempted murder in the second degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree, and unauthorized use of from 15 to life on each of the attempted murder convictions, 5 to 15 years on the criminal possession of a weapon conviction, 2 1/3 to 7 years on each reckless endangerment conviction, 2 1/3 to 7 years on the criminal possession of stolen property conviction, and one year in the unauthorized use of a motor vehicle conviction.

Friedmann, J., at trial and sentence.

The Trial Evidence

The People's Case

Police Officer **William Cleaver** of the 113th Precinct was assigned to the anti-crime unit on the evening of January 31, 1983. He was on a 5:30 p.m. - 2:00 a.m. tour, cruising in an unmarked police vehicle with his partner, Kevin Parham. Cleaver was the driver, Perham the recorder (68-70).*

Several minutes after midnight, on February 1, 1983, Cleaver spotted a blue Chevrolet on Rockaway Boulevard with four male occupants. At that time he received a radio transmission of a "dispute with knives" and left the scene. The transmission proved unfounded, and Cleaver drove back to the scene where he had spotted the Chevrolet. On the way back, Cleaver passed the subject vehicle, which now had only three occupants. He made a U-turn and followed it. When Cleaver pulled his vehicle behind the Chevrolet another occupant exited, leaving only the driver and a rear passenger seated behind the driver. The male passenger turned around and looked at the policeman (70-74).

At that point, Cleaver put a revolving red "fireball" light on the roof of the car and turned on flashing red grill lights. The Chevrolet sped away; the police pursued. During the chase, the Chevrolet made nine turns in an effort to "shake" the police car. When Cleaver radioed the license plate of the vehicle, he learned that the vehicle was wanted in connection with "some robberies

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* Numerical references are to the pages of the trial transcript dated March 23, 1984.

in two precincts." At two points during the chase, which lasted 4-5 minutes, the occupants of the Chevrolet tried to "bail out" but the police car was too close behind. Cleaver testified: "They didn't jump." He was able to see Bennett's face on several occasions: Cleaver saw Bennett's face originally on approaching the vehicle; on two occasions when Bennett turned around and fired twice at the officers; two times when Bennett tried to "bail" out of the car; and "at the very end" of the chase. Cleaver identified the defendant in court as the male in the rear passenger seat of the Chevrolet who "fired two shots at us" (73-75, 77-78, 120, 133).

At the end of the chase, in a parking lot, at the rear of Junior High School 231, adjacent to a field, the defendant, pistol in hand, jumped out of the car and fled through the field with his companion. Before they did so, however, the police fired at them (78-81).

It was stipulated that if Martin Shapiro, a ballistics expert testified, he would state that an examination of the police vehicle showed "bullet crease" damage to its hood. Cleaver testified that before the chase there was no hood damage. An aerial photograph admitted into evidence showed that Bennett's sisters lived nearly the scene where the car chase ended (70, 178-179). The defendant himself lived in the area (323).

On February 23, 1983 Cleaver went to the 105th Precinct and identified Bennett in a lineup. He recognized Bennett as the man who was seated in the rear passenger seat of the blue Chevrolet, "the night [he] shot at us" (100, 103).

Officer **Kevin Perham's** testimony paralleled that of Cleaver's. He testified that the blue Chevrolet was spotted in a "robbery-prone location" on Rockaway Boulevard (241-242).

When the police car pulled in back of the Chevrolet, Perham was able to see Bennett's face when he turned around. He also stated that during the chase he was able to see Bennett's face "a few times" when Bennett turned around to "monitor how close we were to them." He kept turning around first to watch us, to see what we are doing." Perham also saw the defendant's face when the defendant leaned out of the door of the Chevrolet and fired twice at him. Perham returned the defendant's fire. He identified the defendant in court as the man in the rear seat of the Chevrolet he "saw on that day holding a gun." He stated that at the end of the chase he was able to see Bennett's face in the light of the police car headlight "which illuminated the area very well." When Bennett, pistol in hand, exited the car, and turned and pointed it at the police. Perham viewed a lineup at the 105th Precinct on February 22, 1983 and identified Bennett as the man who fired the pistol at them during the car chase. He said that on the night of the chase there was no fog on the back window of the Chevrolet (241-243, 249, 251-253, 262, 274).

Detective **Daniel Collins** of the 105th Precinct testified that on February 23, 1983 he conducted a lineup at the precinct. The lineup was viewed separately by Officers Cleaver and Perham From his experience and from his investigation of the course of the car chase, Collins concluded that the perpetrators were from the area. He stated that the blue Chevrolet was stolen from the 44th Precinct in the Bronx (185, 229, 238).

Defense Case

Julian Ishmael, a good friend of Bennett's, stated that on January 31, 1983 he played basketball with the defendant at P.S. 52. After the game ended (between 5:00 p.m. and 6:00 p.m.), he went home. He lived at 145-42 179th Street, Springfield Gardens. About 15 minutes after arriving home

Bennett came to his house. Ishmael testified that for the next several hours he and Bennett drank wine and watched a college basketball game on television (283-285, 287, 288A, 293). They never left the house (288A).

After the basketball game on television ended, he walked the defendant to the door, opened it, heard shots, and saw lights flashing on Conduit Boulevard. Together he and Bennett went to Springfield Park to see what was going on. When they arrived at the scene they saw the blue Chevrolet. They stayed at the scene for about thirty minutes, talked to "another guy," then returned to his house and finished the wine. Bennett slept over his house that night. This was the first time that Bennett slept over (288-290).

Tony Bennett's testimony paralleled that of his alibi witness Ishmael. He stated that while at Ishmael's house they matched drinks: "yellow rum" (230). While at the scene, at the field where the blue Chevrolet was abandoned, Bennett met a Mr. Mahamed, who was seated in court. Bennett pointed out Mahamed in court and stated that he talked to him on the night in question, in front of Mahamed's house diagonally "in front of" the field. According to Bennett, the blue Chevrolet was about 150 yards from Ishmael's house (348).

Bennett denied that he was in the blue Chevrolet on February 1, 1983 or that he fired a pistol at police officers on that date. He alleged that not only was he not an associate of co-defendant Chisholm, but that he and Chisholm had several fights since the night of the crimes. The first time they fought was on February 24, 1983, the day after the police told him that Chisholm had told them that Chisholm was the driver and he was the shooter. During one fight, at a subway station, police intervened. They each time falsely accused each other of

robbery (338, 346, 355, 357-359).

POINT ONE

THE DEFENDANT WAS PROVED OVERWHELMINGLY (Answering Defendant's Points II and IV, pp. 13-16, 19).

The defendant argues that his conviction must be reversed because the People failed to prove him guilty of attempted murder in the first degree beyond a reasonable doubt. This argument is devoid of merit.

Viewing the evidence in this case in a light most favorable to the prosecutor, any rational terir of fact could have found that the People proved its case of attempted murder in the first degree beyond a reasonable doubt. People v. Malizia, 62 NY2d 755 (1984).

The identification of the defendant Bennett, as the man in the back seat of the stolen blue Chevrolet who fired two shots at officers Cleaver and Perham during car chase was established by unequivocal credible testimony. Credibility is a matter to be determined exclusively by the trier of the facts. People v. Contes, 60 NYS 2d 620 (1985).

Both officers, Cleaver and Perham, initially saw Benett seated in the back of the car when he turned around after the pulled behind it and a few times during the chase when he turned around to "monitor how close they were to him"; when he tried to "bail" out of the car twice; when he turned around to shoot at them; and when he turned around after exiting the vehicle. Bennett's face was illuminated at times by the overheard streetlights, at times by the police headlights, and at time by a

combination of both. Supporting these observations were the in-court and line-up identifications by each officer – which were unimpeached. Also, undoubtedly, it was not lost on the jury that during the chase the police vehicle was directly behind the Chevrolet – and at times as close as three feet: The police car was "right on their bumper" (76). Notably, Perham testified inter alia that when Bennett exited the car at the end of the chase he lingered for "a few long seconds where I got a good look at him" (278). Also not lost on the jury was the fact that the eyewitnesses, i.e. Cleaver and Perham, were not ordinary witnesses. They were trained and experienced for precisely the role they played on February 1, 1983. Their objective was the detection of criminal activity and the apprehension of the perpetrators. They could be expected to make careful observations, focused all the more by their consciousness of their future need to make an in-court identification. Indeed, the expertise of trained police officers has been judicially recognized. People v. Morales, 37 NY2d 271 (1975). Contrary to Bennett's contention that Cleaver could not see his face, the record shows that Cleaver unequivocally stated he could-and he did (73-75, 77-78, 120, 133). Also, contrary to defendant's contention, Cleaver never wrote in his report that he might not be able to identify the defendant. It was Detective Collins who wrote in his (Collins) report that the officer Cleaver was not sure he could make identifications. The fact remains however, the Cleaver was able to identify Bennett and did so when he independently picked him out of a lineup of six persons and subsequently identified him in court.

The defendant's argument that the rear window on the Chevrolet "would have fogging on it obscuring the identity of the occupants" (defendant's brief p. 15) is belied by the record. Perham testified that there was no fog on the windows of the blue Chevrolet (274).

Finally, it should be noted that any inconsistencies in the People's case was resolved by the jury against the defendant Bennett. The responsibility for resolving questions relating to the credibility witnesses lies with the jury. See, People v. Malizia, supra; People v. Herriot, 110 AD2d 851 (2d Dept. 1985); People v. Morgan, 107 AD2d 718 (2d Dept. 1985) and their determination in this regard may not be overturned lightly on appeal. People v. Bigalow, 106 AD2d 448, 449-450 (2d Dept. 1984).

Matched against the credible, independent and unequivocal identification of the defendant, by the officers Cleaver and Perham was the defendant's incredible testimony and that of alibi witnesses, Ishmael. That the jury saw through their transparent tissue of falsehoods is undeniable. The defendant, presenting himself as a married man with the responsibility of a wife, child and job, allegedly played basketball with Ishmael, later went to his house, drank almost a bottle of rum with him, watched television and dozed. Ultimately, instead of going home to his family, Bennett slept over Ishmael's house. It is quite understandable that in light of this questionable behavior by the defendant that the jury also rejected his and his alibi witness' unbelievable story that they coincidentally and serendipitously heard shots being fired as they were leaving Ishmael's hosue.

The defendant's argument that the People did not prove he intended to murder and did not know Cleaver and Perham were police officers is also belied by the record. The credible evidence before the jury shows that the defendant Bennnett was in a stolen car* which was implicated in "some robberies" (120).

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* It was stipulated that defendants had no permission or authority to be in or drive the vehicle (17).

When the police pulled behind the car they put a revolving red flashing light on the roof of the car and turned on the flashing red grill lights: all the telltale signs of a police vehicle. At that point, Bennett knew or "reasonably should have known" that the occupants of the car which followed them were police officers. P.L. § 125.27(1)(a)(i). Certainly, the jury came to this conclusion. That the defendant intended to murder the police officers was also a reasonable inference for the jury to draw from all the surrounding circumstances. The defendant fired a pistol – a deadly weapon – at them and actually hit the police car with a bullet. This fact is verified by the report of the ballistics expert Martin Shapiro (People's #8 in Evidence) who opined that the damage on the hood of the police car was a "bullet crease" (178).

In sum, it was rational for the jury in this case to credit the police identification testimony and to disbelieve Bennett and his alibi witness and to conclude thereby that the defendant's guilt had been proved beyond a reasonable doubt. See, People v. Jackson, 114 AD2d 858 (2d Dept. 1985).

POINT TWO

THE COURT DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL OR COMMIT REVERSIBLE ERROR IN NOT RECEIVING MAHAMED'S TESTIMONY (Answering Defendant's Point I, pp. 11-12).

The defendant contends that the court committed reversible error in not permitting Elias Mahamed to testify as either an alibi or ordinary defense witness. This contention is

untenable.*

Considering Mahamed as an Alibi Witness

At the outset, it should be noted that defense counsel did not argue that Mahamed was an alibi witness and thus, this issue was not preserved. CPL §470.05(2); People v. Brailsford, 106 AD2d 648 92d Dept. 1984).

Assuming, arguendo, that the issue was preserved, and that Mahamed was an alibi witness – or an extention of alibi witness – the court acted properly in not permitting him to testify. CPL §250.20(2) authorizes a trial court to exclude testimony of an alibi witness where a notice of alibi does not specify the witness. Here, the alibi notice only specified one witness i.e., Julian Ishmael.**

The defendant's allegation that the People knew Mahamed would be called to testify is erroneous. Not only does the defendant concede that there was no written notice of alibi served in conformity with the statute, but the prosecutor advised the court at the time Mahamed was called to testify that he received no advance notice that Mahamed would be called (314). Thus, the Court had the statutory authority to exclude

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* The co-defendant Chisholm was acquitted. The distinction between the two verdicts is understandable: Chisholm did not turn around and face the officers as did Bennett intially and during the chase. Also, Officer Cleaver stated that his view of Chisholm was blocked "to some extent" by Bennett's body which was directly behind Chisholm (144-145); and, although Chisholm drove the vehicle his fingerprints were not found on the steering wheel.

** Attached hereto and marked exhibit 1 is defendant's notice of alibi indicating that his sole alibi witness was Julian Ishmael.

Mahamed's testimony. CPL §250.20(3). The defendant's reliance on People v. Morales, 43 AD2d 917 (1st Dept. 1974) aff'd 37 NY2d 262 (1975); and People v. Peterson, 96 AD2d 871 (2d Dept. 1983) for the proposition that the court's exclusion of alibi witness testimony in the absence of statutory required notice of alibi warrants reversal is misplaced.

In Morales, a drug case, the defendant was prevented from calling an alibi witness as a sanction for failure to comply with the notice of alibi mandated of CPL §250.20 as then constituted. The conviction was reversed because as then constituted the notice of alibi statute did not provide for reciprocal discovery requiring the People to disclose the names of proposed witnesses to rebut the prospective alibi witnesses, thus rendering the statute unconstitutional by virtue of the holding in Wardius v. Oregon, 412 US 470 (1973). However, CPL §250.20 was rendered constitutional by amendment providing for reciprocal discovery. (L 1974 ch. 420). Therefore, unlike the Morales case, the court here applied the sanctions of a constitutional statute. The Peterson case is distinguishable from the instant case on the facts. There, in a robbery-burglary case, the defendant was denied the right to call an alibi witness although he had given the People eleven days written notice of alibi. Here, as indicated the defendant gave no notice. Additionally, the trial court in Peterson committed an egregious error, inter alia in allowing the prosecutor to state in summation that he defendant's witness had failed to corroborate the alibi defense. On appeal this Court concluded that that "comment was patently unfair in light of the preclusion imposed upon the defense." Here, the court provided the defendant with an eminently fair trial, and the prosecutor's conduct was proper throughout.

Considering Mahamed as an Ordinary Witness

An analysis of the record shows that as an ordinary witness, Mahamed's testimony was merely cumulative to Ishmael's and the defendant's testimony to a collateral issue: that the defendant was across the street from the site of the end of the chase about one half hour later, at about 1:00 a.m. The chase occurred between 12:19 a.m. and 12:24 a.m.* (318). Clearly, Mahamed's testimony was collateral to the main issue: the defendant's guilt. The defendant, as the record shows, knew Ishmawel lived in the area – (174-176) – and could easily have escaped from the scene and returned one half hour later with Ishmael.** In no way was Mahamed's testimony critical to the defense as his testimony did not exculpate the defendant.

Furthermore, it should be noted that on direct examination the defendant fully conveyed to the jury the story of his and Ishmael's meeting with Mahamed near the scene. In fact the defendant named and pointed out Mahamed seated in the courtroom, in the jury's presence (334-336).*** He also testified to the substance of their conversation. Thus, there was nothing Mahamed's testimony could have added to the defense. The defendant testified:

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* Defense Counsel Scheidler pointed out that the sprint report indicated that the helicopter arrived at the scene at about 1:45 a.m. (320). The defendant testified that he arrived at the scene about 30-40 minutes before (334). This would place the defendant at the scene at the earliest, approximately 36 minutes after the chase ended.

** It should be noted that the court received a statement from Alfred Seaman, an acquaintance of Bennett, presented to it by Bennett's attorney in support of the post-conviction motion to set aside the verdict, which asserted that he saw Bennet and Ishmael in the blue Chevrolet on the night of the incident. See Exhibit 2, pp. 5-6.

* According to the trial court Mahamed "stood up [in front of the jury] and acknowledged the defendant's identification of him." Exhibit 2, p. 13.

...that's when we met Mr. Mahamed... He's sitting over there. He was standing in front of his house... in a bathrobe... looking at the action.

* * *

We walked to him... [and] asked him what was going on... He said he didn't know.

So Mr. Mahamed was saying, 'Don't stand there. Someone could run out of there and they could start shooting.' And he said, 'Come in my gate.' So me an Julian [Ishmael] we went in Mr. Mahamed's gate and we were, you know, standing there, talking, laughing, you know.

* * *

So, we just... me and Mr. Ishmael, we just left, you know we told Mr. Mahamed, 'Nice talking to you,' blah, blah...,. and we just left... (334-336).

The defendant relies on People v. Cuevas, 67 AD2d 619 (1st Dept. 1979) for the proposition that he court committed reversible error in not permitting Mahamed to testify as an ordinary defense witness. The defendant's reliance on Cuevas is misplaced. There are a few important distinguishing features between Cuevas and the instant case. In Cuevas, an attempted robbery-assault case the defendant wished to call two witnesses to testify as to his whereabouts and activities after the time of the crime. Not only did the Cuevas court prohibit the defendant from calling the witnesses, it prohibited the defendant from mentioning their names. Here, not only did the defendant fully

relate to the jury his activities after the time of the crime and his meeting with Mahamed, he presented an alibi witness who also named Mahamed as the man they met across the street from the site of the end of the chase and, as indicated, Mahamed, was in the courtroom, identified by the name by the defendant and stood up in the jury's presence. Additionally, and importantly a distinguishing feature in Cuevas is that the identification testimony was weak. In Cuevas, the defendant was identified by a sole civilian complainant who "had difficulty seeing at close range." Cuevas, supra, at p. 227. The complainant in Cuevas was contradicted when he stated he never wore glasses. Here, on the other hand, the defendant was identified by two trained law enforcement officers whose ability to see well as not contested and whose eyewitness and independent lineup identifications were positive and unimpeached. Furthermore, in Cuevas, the court improperly curtailed the defendant's redirect examination and deprived him of a key opportunity to discredit the sole witness' identification. Here, there was no such vice. The trial court permitted defense counsel complete leeway to challenge Cleaver's and Perham's identification.

Considering all the aforesaid circumstances, the court did not abuse its discretion nor deprived the defendant of a fair trial in excluding Mahamed's testimony. In any event the defendant suffered no prejudice as a result. See, People v. Kancar, 307 NY 782, 783 (1954); cf. People v. Thomas, 116 AD2d 678 (2d Dept. 1986); People v. Henson, 113 AD2d 954, 955 (2d Dept. 1985); People v. Ceulet, 111 AD2d 833 (2d Dept. 1985).

Finally, in view of the overwhelming evidence presented by the eyewitness testimony of two trained police officers who positively, and unequivocally identified the defendant as the man who shot at them. (See, Point I) any error with regard to the

exclusion of Mahamed's testimony was harmless. There is no reasonable probability that any error in this regard, if indeed there was one, might have contributed to the defendant's conviction. People v. Crimmins, 36 NY2d 230 (1975).

POINT THREE

THE COURT PROPERLY DENIED DEFENDANT'S MOTION TO LET ASIDE THE VERDICT WITHOUT A HEARING. (Answering Defendant's Point III, pp. 17-18).

The defendant argues that the court committed reversible error in denying his motion to set aside the verdict on the grounds of newly discovered evidence without conducting a hearing. This argument is frivolous.

To be considered, "newly-discovered" evidence so as to support a motion to vacate a judgment of conviction, the evidence in question must meet all six criteria set aside in People v. Salemi, 309 NY 208, 216 (1955), specifically:

> 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could not have been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must be merely impeaching or contradicting the former evidence.

Here, the evidence in question fails to meet the criteria in two respects, that is, (1) there is no probability that the

evidence would have altered the jury's verdict, and (2) the defendant did not establish by a preponderance of evidence that it could not have been discovered with due diligence before trial.

1. The evidence would not have altered the jury's verdict.

a) As to the "newly discovered" witness Alfred Seaman.

In support of his motion to set aside the verdict on the grounds of newly discovered evidence the defendant submitted to the court a letter from Alfred Seaman alleging that he saw the defendant and Ishmael get6 out of the blue Chevrolet "a few minutes" before the car chase leaving Ronald Cephus and Ricky Whitehouse seated within the vehicle when the police gave chase (S 3).* This statement contradicts both the defendant's and Ishmael's trial testimony that both he and Ishmael were in Ishmael's were in Ishmael's house a few hours before and during the time of the chase. In no way could this evidence "change the results." Furthermore, Seaman's oral statement, to the District Attorney's Office contradicted his written statement. In his oral statement, he alleged that Bennett and Ishmael exited the car about 8:30 p.m. on January 31, 1983 (S 4). This changed story, in which Seaman alleged a different time frame, also contradicted the defendant's and Ishmael's testimony that they were together in Ishmael's house at the time. Finally, Seaman submitted to a lie detecter test in which he performed "very poorly." His performance was characterized by the lie detector analyst as "highly deceptive" (S 5).

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* "S" numerical references are to the pages of he sentence transcript of September 25, 1984.

b. As to Rose Powell's testimony.

The prosecutor interviewed another "new discovered" witness for the defense, Rose Powell - the defendant's sister. She stated that she saw the defendant and Ishmael coming from a store at 10:30 p.m. on January 31, 1982 (sic) and during a conversation with him the defendant said "I'm going to Ishmael's house" (S 5). Not only does Powell's prospective testimony contradict knowledge of her brother's whereabouts after 10:30 p.m., it would not help exculpate him as the crime was committed almost two hours later.

2. The defendant did not establish that the newly discovered evidence could have been established with due diligence.

Another criterion to be met by the defendant in support of his motion to vacate his conviction on the grounds of newly discovered evidence is that he must show that it could not have been discovered before trial with due diligence. The defendant did not sustain that burden.* Notably, the trial court afforded the defendant the opportunity to testify at "an anticipated hearing" on September 25, 1984 as to any of his allegations made to the court in his letter of May 5, 1984, or as to any allegations made by Seaman in his statement of September 14, 1984. The defendant, after consultation with counsel said: "I prefer not to" (S 7).

In no way does the defendant demonstrate that even if he had acted diligently, he could not have discovered the aforesaid "newly discovered evidence" before trial. Nor does he

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* The court, in its decision on the motion stated that Bennett in his letter of May 5, 1984 to the court indicated that he knew about "Cephus-Whitehouse involvement prior to trial." Exhibit Z, p. 11.

demonstrate that such evidence would probably change the result if a new trial was granted.

Contrary to defendant's implication, the court did not have a problem with the fact that the jury acquitted the co-defendant who was also identified by the police. The court in its decision stated: "This court finds no problem with the jury's split determination. There was ample evidence in the trial record to support the verdict, including abundant evidence concerning the past and present incompatibility of the two defendant's" Exhibit 1, p. 3. Also, as indicated, the jury noted that Bennett, seated in the back seat, blocked the officers' view of the driver.

In sum, the People proved the defendant's guilt by overwhelming evidence and the jury's verdict would not be changed by the preferred testimony of the two alleged "newly discovered" witnesses, whose testimony was inconsistent with that of the defendant and his alibi witness, Ishmael. In addition the defendant has not shown that if he exercised due diligence he could not have discovered the witnesses during the almost 15 months from the time of the incident to the time of trial. Therefore, the proffered evidence. Nor does the record indicate that any hearing other than the Court's "anticipated hearing" or September 24, 1984, was necessary.*

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* See, Exhibit 2, p. 7.

POINT FOUR

THE COURT PROPERLY DECIDED THE SUPPRESSION MOTION (Answering Defendant's Point V, pp. 20-22).

The defendant argues that the court committed reversible error in not suppressing the lineup identifications by Officers Cleaver and Perham, which he claims were tainted by impermissibly suggestive photo identification procedures. This argument is devoid of merit. We shall in turn, review the hearing testimony, the Court's decision, and discuss that decision as it related to the identification testimony.

The Wade Hearing Evidence

A Wade hearing was commenced on December 18, 1983 before the Honorable Joan J. O'Dwyer and continued to December 20, 1983.

Detective **Daniel Collins** of the 105th Precinct, Detective Unit testified that he was assigned to investigate the attempted murder to police officers William Cleaver and Kevin Perham (H 9).*

Pursuant to that assignment, Collins obtained photos from the Police Department Photo Unit at One Police Plaza. On February 23, 1983, at about 3:00 p.m., he placed eight photographs including one of the defendant Tony Bennett, on a desk in the anti-crime office of the 105th Precinct. Collins then called Officer Perham and Cleaver into the office - separately -

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* "H" numerical references are to pages in the hearing transcript dated March 16, 1983.

to see if they could recognize among the photos, the man in the rear seat of a blue Chevrolet who shot at them during a car chase on February 1986 (H 14-15, 25-26, 30-32).

Perham, who viewed the photos first, picked out the defendant's photo within a minute. Perham said: "That's him, that's him, that's him..." Cleaver, who was called into the office next, identified Bennett's photo in less time than it took Perham (H 30, 34, 36, 38-39).

Later that evening, at 9:35 p.m., Collins arranged a lineup of six persons including Bennett. Cleaver and Perham - separately - picked out the defendant - number three - as the person who shot at them during the car chase. On viewing the lineup Perham immediately said: "He (number 3, Bennett) was in the back seat. He shot at us." Cleaver said: "[That's] the guy (number 3, Bennett) that shot at us" (H 14-16, 19, 42, 46).

Police Officer William Cleaver testified that while on duty in an unmarked police car, he observed a blue Chevrolet near a Shell station. After returning from a call to a different location he saw the Chevrolet going North on Rockaway Boulevard. When the vehicle sped away from the scene, Cleaver, who was driving the police vehicle, pursued it (H C 27, 37 -39).*

During the pursuit of the Chevrolet, the rear passenger, whom Cleaver identified as the defendant, leaned out of the car - turned around facing the police car - and fired two shots at the police. At this point, Bennett's face was visible in the light of both the police vehicle and overhead streetlights. Cleaver stated

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* "HC" numerical references are to the pages of the transcript of the continued Wade hearing of March 20, 1983.

that during the chase, his vehicle came as close as three feet from the Chevrolet. When the defendant fired the shots, he was ten feet away (HC 37-38, 41-42). He said, "I [saw] the man's face, sure (HC 42).

At the end of the chase, Cleaver saw the defendant when he exited the left rear passenger side of vehicle, pistol in hand, 25-30 feet away. The police car headlights and street lights illuminated the defendant's face during the chase (HC 45-46, 57).

Cleaver corroborated Detective Collins' testimony that he made a photo and lineup identification of Bennett at the 105th Precinct independent of Perham's identification in 20-25 seconds (HC 50, 52, 54-55).

Police Officer **Kevin Perham's** testimony paralleled Officer Cleaver's. He stated that the headlights of the police vehicle illuminated the rear seat of the Chevrolet when they first pulled behind it - and he saw Bennett. After about three minutes into the chase, the defendant fired his pistol at the police car. The defendant's arm and head were out of the Chevrolet when he fired his weapon twice. The car was "directly below the street light" at that time. At the end of the chase, when the defendant got out of the vehicle, 20-30 feet away, he turned, faced the officers, and pointed the pistol at them. At that time, in the reflection of the police car headlights, Perham was again able to see Bennett's face, "A few long seconds" (HC 61, 66, 68-70).

According to Perham, he made a photo identification of the defendant separate form that of Cleaver's. He selected the defendant's photo in "seconds" from a display of several photos laid out on a desk by Detective Collins at the 105th Precinct. He identified the defendant at the lineup as soon as he aw his

face (HC 73, 75-76, 78-79).

The Court's Decision

The court denied defendant's motion to suppress the lineup identification by Cleaver and Perham. After summarizing the evidence, it concluded that under the totality of circumstances the photo identification procedure was not unduly suggestive and, therefore, it did not taint the later lineup identification - "nor create the likelihood that [an] in-court identification would be tainted" (D 5).* As to the lineup, the court also found the procedure was not "suggestive or conducive to irreparable misidentification." Thus, the court held that testimony regarding the lineup was admissible at trial (D 5).

As to the photo identification procedure.

The photo identification procedure was not impermissibly suggestive as defendant contends.

The need for a fairly conducted pretrial identification procedure was articulated in United States v. Wade, 308 US 218 (1967). "The test to be used in determining the propriety of the pre-trial identification is one of fairness." People v. Logan, 25 N.Y.2d 184, 191 (1969).

The United States Court established a "totality of circumstances" standard to determine whether a pre-trial identification procedure violated due process." Stovall v. Denno, 388 U.S. 293, 302 (1967). To be avoided are those practices that may give rise to a "very substantial likelihood of

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* "D" numerical references are to the page of the court's decision attached hereto as Exhibit 3.

irreparable misidentification" as to amount to a denial of due process of law. Manson v. Brathwaite, 432 U.S. 98, 116 (1977).

Here, the photo identification procedure was fair. Detective Collins placed the defendant's photo along with seven others faced up on a table and held separate viewing with Officers Cleaver and Perham. The photo spread viewed by them "featured individuals similar in age and physical characteristics to the defendant." There was nothing "unduly suggestive in form or matter of exhibition" (D 5). Although the defendant's name was on the back of his photo, nothing in the record shows that either officer looked at the back of the photo before the identification procedures. When Detective Collins called the officers into the viewing room he merely asked one to the look at the photo (H 31, 35). He directed Officer Perham not to talk to Officer Cleaver after identifying the defendant's photo - he "made sure that they wouldn't speak to each other" (H 36). In sum, the photo identification procedures, under the totality of circumstances, were not impermissibly suggestive and thus did not taint the subsequent lineup or in-court identification.

As to the lineup identification procedures.

The lineup procedures were likewise not impermissibly suggestive or conducive to irreparable misidentification. "The stand-ins were of the same approximate age, skin coloration, and general physical characteristics as the defendant. There was nothing glaringly dissimilar in the appearance of the defendant to that of the stand-ins" (D-5). There is nothing in the record to show otherwise; the defendant's unsupported allegation to the contrary notwithstanding.

Detective Collins conducted separate lineup procedures with each officer; and merely asked them standard lineup procedure questions: Do you recognize anyone?; What number do you recognize?; Where do you recognize him from? (H 18). Thus, under all the circumstances the lineup procedure was not unduly suggestive, on the contrary it was conducted in an eminently fair and proper manner.

As to independent source.

Assuming arguendo, that the pre-trial identification procedure were suggestive, still, there was an independent basis for the in-court identification. This basis was established at the suppression hearing by clear and convincing evidence. See, People v. Williams, 73 A.D.2d 1019 (3d Dept. 1980).

Among the factors to consider in determining independent source include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, and the level of certainty demonstrated at the confrontation. See, Manson v. Brathwaite, 432 U.S.98 114, (1977).

The facts in this case is related to the above analysis show:

1. Opportunity to view. Cleaver testified that the observed the defendant's face during the chase when the defendant leaned out of the car, turned facing him and fired two shots. He stated that the police vehicle came as close as three feet to the Chevrolet and hat at the time the defendant fired the shots he was ten feet away from him (HC 42). Street lights directly overhead lit up the defendant's face - as did the police car headlights (HC 46). Officer Perham testified similarly to

Cleaver. He stated that the police car headlights were "on the rear of the car. I could see the rear seats."; that the defendant with "his arm and head outside the car" faced them and fired his pistol at them; and "When the defendant fired his pistol, he was "directly below the street lights" (HC 68). At the end of the chase, the defendant exited the vehicle "turned around and pointed the gun" at the officers. Perham asserted that he saw the defendant then "a few long seconds" (HC 70). Thus, both officers had an adequate opportunity to view the defendant - it takes only seconds to "indelibly sear" an image in one's memory. United States ex rel. Phipps, 428 F2d 912, 916 (2d Cir. 1970). See, People v. Herriot, 110 A.D.2d 851 (2d Dept. 1985) where this Court found that a few seconds viewing of the defendant, who wore a hooded sweatshirt and a baseball cap, sufficient to sustain conviction despite inconsistences in the complainant's testimony and the presentation of an alibi witness.

Additionally, Cleaver and Perham were not casual or passing observers as so often is the case with eyewitness identification: they were trained and experienced observers. See, People v. Morales, 37 N.Y.2d 271 (1975).

3. The Witnessess' level of certainty.

Both officer's unequivocally, unhesitatingly, and positively identified the defendant as the perpetrator in the rear seat of the Chevrolet who leaned out the door of the car, turned towards them and fired his pistol at them. At no time did they express any doubt that the defendant was the shooter. The record shows that at separate photo and lineup identification procedures Cleaver and Perham selected the defendant out of several individuals.

Contrary to defendant's allegations, there is nothing in

the record that supports his theory that the rear window of the Chevrolet was fogged; that there was insufficient light to make an identificaiton; or that knowledge of an arrest put pressure on them to identify someone. It has been held that informing a witness that he is going to view a suspect will not be itself vitrate on otherwise proper identification. People v. Osgood, 89 A.D.2d 76, 77-78 (2d Dept. 1982). Also, contrary to defendant's contention, the officers did not state that they could not make an identification. Perham stated categorically he never said that (HC 82); Detective Collins corroborated Perham's testimony when he testified that he spoke to Perham in person and Perham told him he could make an identification (H 72). Although Cleaver did not recall telling Detective Collins he was not sure he could make an identification, the fact remains that he was able to an did so - separately and independently of Perham's identification. It would be stretching credulity to the breaking point to believe that both officers mistakenly identified the defendant - considering the odds against them both picking the defendant's photograph out of eight and selecting him out of a lineup of six-independently and on separate occasions.

In sum, the photo identification procedure was not impermissibly suggestive and did not taint the lineup procedure which was proper.

Thus, the court acted properly in denying the defendant's motion to suppress the lineup identification. In any event, because there was independent source established at the Wade hearing, the in-court identification of the defendant at trial was proper even if the pre-trial identification procedures were impermissibly suggestive.

POINT FIVE

THE SENTENCE WAS PROPER. (Answering Defendant's Point IV, p. 22-23).

The defendant contends that because he was convicted of attempted murder in the first degree under PL § 125.25, a class B felony, he should have been sentenced to a prison term of 8 ½ to 25 years. This contention is erroneous - the defendant was convicted of attempted murder in the first degree under PL § 125.27, an A-1 felony. Clearly, under PL § 110.05, an attempt to commit a crime is a "class A-1 felony when the crime attempted is a class A-1 felony of murder in the first degree." (Emphasis added.) PL § 70.00(3)(a)(c) provides that for a class A-1 felony the minimum period of incarceration "shall not be less than 15 years." The maximum term for a class A felony is life imprisonment. PL § 70.00(2)(a). Thus, the court's sentence of from 15 years to life for the conviction of attempted murder of a police officer CPL § 110/125.27(1)(i) was the minimum period of incarceration permitted under the law and proper.

Moreover, although the defendant is correct that it is important to consider his potential for rehabilitation, it is also important to consider the protection the sentence can afford the community (deterrent factor). People v. Ferrar, 52 N.Y.2d 302, 305 (1981), and the effect the crime had on the victims - here, police officers engaged in performing their duties to protect the public.

In sum, the defendant's sentence was neither harsh nor illegal. It fell well within the maximum limits prescribed by law, i.e., 25 years to life PL § 70.00(2)(a), 3(a)(i). The defendant obtained leniency by his minimum sentence - he deserves no more; having fired a deadly weapon at police officers with the

intent to kill them. Therefore, in no way should the sentence be reduced.

CONCLUSION

THE JUDGEMENT OF CONVICTION
SHOULD BE AFFIRMED

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County

Seymour Roth
Assistant District Attorney
of Counsel

October, 1986

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART C3

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NOTICE
OF ALIBI

TONY BENNETT,

IND. NO. 842/83

Defendant.

PURSUANT to C.P.L. § 250.20, the defendant, by this court appointed attorney, CHARLES LAVINE, serves formal notice that the defense of alibi will be relied upon at the trial of the indictment.

At the time of the alleged crime the defendant was at 145-42 179th Street, Springfield Gardens, New York, JULIAN ISHMAEL, 172-16 144th Road, Springfield Gardens, New York 11434 is an alibi witness. There may be additional alibi witnesses, but appointed counsel is unable to ascertain their identities without the services of an appointed investigator. The appointment of such a necessary expert has twice been denied by the court, said relief having been opposed by the prosecution.

PLEASE TAKE NOTICE that not later than ten days before trial, the prosecution must serve and file a list of the

witnesses it proposes to offer in rebuttal to discredit the alibi along with their addresses and places of employment.

TO: JOHN SANTUCCI
District Attorney

JOHN J. DURANTE
Clerk of the Court

CHARLES LAVINE
Attorney for Defendant
70-49 Austin Street
Forest Hills, N.Y. 11375

Short Form Order

SUPREME COURT – STATE OF NEW YORK
CRIMINAL COURT - PART L-5 QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, NY 11101

PRESENT:
HON. WILLIAM D. FRIEDMANN
Acting Justice

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Ind. No. 843/83

: Motion to set aside verdict

TONY BENNETT :

Defendant :

The following papers numbered
1 to 4 submitted in this motion

AUGUSTUS C. AGATE, ESQ.
CHARLES D. LAVINE, ESQ.
For the Motion

JOHN SCARPA, A.D.A.
Opposed

Papers Numbered

Notice of Motion and Affidavits Annexed _____
Answering and Reply Affidavits _____

Exhibits _____

Minutes (Grand Jury) _____

Upon the foregoing papers and in the opinion of the court herein the defendant's motion is denied. (See attached memorandum decision dated 12/1/84.

GRANTED: JOHN J. DURANTE

Date: December 1, 1984 _____
WILLIAM D. FRIEDMANN, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART L-5

THE PEOPLE OF THE
STATE OF NEW YORK

BY WILLIAM B. FRIEDMAN

- against-

DATED: December 1, 1984

TONY BENNETT

Ind. No. 842/83

Defendant.

IN OPPOSITION TO THE MOTION

HON. JOHN J. SANTUCCI
District Attorney
By: John Scarpa, A.D.A.
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FOR THE MOTION

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OPINION OF THE COURT

(Confirming Decision, on the Record of September 25, 1984)

This trial, jury verdict and defendant Tony Bennett's motion to set aside the verdict against him include many dramatic developments. However, these events, though interesting, do not, at this time, justify granting any part of Bennett's motion.

RELEVANT EVENTS

The jury trial (March 20-27, 1984)* centered upon a wild shootout car chase through the streets of southeast Queens County, worthy of a movie or T.V. script. The chase involved two young black males in a blue Nova and two policeman following in a unmarked car. It took place on February 1, 1983, at or about 12:20 A.M. The blue car, the subject of the chase, had been stolen earlier that day form a nun in the Bronx. The car was first spotted in a parked position by the policemen at approximately 12:15 A.M. It was then occupied by four black males. Three to four minutes later, the policeman made a second pass by the car. As the unmarked police car was turning around, the blue car took off. During initial pursuit, two persons exited the blue car. The chase between the two vehicles and remaining occupants heated up. It covered high speeds, and a route including approximately nine turns. Shots were exchanged. Finally, the blue car was cornered behind J.H.S. 231. Both cars then stopped and the remaining occupants, in the blue car, exited into a wooded area behind the school. The two policemen were not injured. Defendant Bennett and his co-defendant Derrick Chisholm were not arrested until some 22

days after the occurrence.

THE BASIC QUESTIONS

The prime trial determination and the main point carried over into this post-trial inquiry was - - - was were the two occupants remaining in the blue car during the wild shootout street chase?

THE JURY'S SPLIT VERDICT

The jury's verdict placed defendant Bennett as the shooter, from the back seat of the blue car. It also acquitted co-defendant Derrick Chisholm of any involvement as the ****** (contrary to the testimony of the two policemen who had identified both defendants).

This court finds no problem with the jury's split determination. There was ample evidence in the trial record to support the verdict, including abundant evidence concerning the past and present incompatability of the two defendants. Their past antagonistic relationship was emphasized by a fight between them and their re-arrest, while they were passengers on the subway. This occurred shortly after, their case had been transferred from the calendar complex part in Kew Gardens, Queens, to the site of their trial in the Long Island City courthouse. Incidentally, their subway encounter caused a delay in the trial's commencement.

POST TRIAL MOTION

Following trial, but before sentence, Bennett's trial attorney filed a written motion to set aside the jury verdict pursuant to CPL 330.30. Subsequently adapted by Bennett's

current attorney, the motion relied upon People v. Cuevasn (67 A.D.2d 219, 225-226 [1st Dept, 1979]). It alleged trial error when this court refused to permit Bennett to call as a post event or extension of "alibi" witness, one Mr. Elias Muhammad (he saw Bennett and his alibi witness in front of his house one hour afer the chase ended). Muhammad's name had not been included in the alibi witness notice required under CPL 250.20. (Trial transcript of March 26, 1984 - Colloquy pp 32 - 42).

The second ground to set aside the verdict arose out of a post conviction letter (May 5, 1984), from Bennett to the court setting forth (a) differences with his trial attorney, and (b) the existence of relevant exculpatory evidence not revealed to the District Attorney or used at the trial (CPL 330.30[3]).

In essence, Bennett contended that prior to trial he gave the names of Ronald Cephus and Ricky Whitehurst to his trial attorney as the two persons that he had been told remained in the blue car at the time of the shootout car chase, that this information had not been transmitted to the Queens District Attorney's Office. Bennett's letter was circulated to all counsel for comment and followup. By letter (May 10, 1984), Bennett's former trial attorney indicated that the names of Cephus and Whitehurst had been brought to his attention by Bennett, for the first time, approximately ten minutes following the adverse jury verdict. That it was later confirmed to him by Bennett's sister and wife when he took them home after the verdict. Bennett's current attorney, by letter (May 15, 1984), urged that in the interests of justice that the contents of Bennett's post conviction letter (May 5, 1984), be considered as part of the then pending motion to set aside the verdict. The District Attorney's Office consented to this procedure.

FOLLOW- UP EVENTS

The District Attorney's office opposed the first branch of Bennett's motion which alleged that the court erred in failing to allow the post-event witness, Mr. Muhammad, to testify. It further, at the court's request, conducted an investigation to determine whether Ronald Cephus and Ricky Whitehurst, as related by Bennett, were involved with the blue car which was the subject of the shootout chase. The information, supplied by Bennett, was confirmed when fingerprints of both Cephus and Whtehurst were lifted from items recovered in the blue car. This established that Cephus and Whitehurst were in the car some time after it was stolen, in Bronx County, during the early part of the day on January 31, 1983. However, the question still remained unanswered as to who remained in the car during the chase and shooting sequence, comprising the period between 12:19 and 12:22 to 12:24 A.M. in the early morning hours of February 1, 1983.

Upon receipt of the information placing Cephus and Whitehurst in the blue car, this court set the matter down for an evidentiary hearing to inquire into the following: (a) the alleged differences between Bennett and his trial attorney regarding information and the involvement of Cephus and Whitehurst, (b) who were the four persons in the blue car when the police made their first pass? (c) who got out of the car during its early pursuit and who remained during the chase and shooting? and (d) what was the source of the information underlying (a) - (c)?

In the interests of justice and to enable both Bennett's current attorney and the District Attorney to conduct further investigations, to evaluate potential evidence, and secure witnesses, including Cephus and Whitehurst, various hearing adjournments were granted (both are reported to be

incarcerated).

During this period, a written statement from one Alfred Seaman was presented by Bennett's current attorney (September 14, 1984). In essence, it contended that Seaman saw Cephus, Whitehurst, Tony Bennett and Bennett's alibi witness, Julian Ishmael, who testified at trial, sitting in the blue car. Part of Seaman's statement stated: "A few moments later I saw Tony and Ishmael get out of the car and R.C. and Lil Rickey remained inside the car. A few moments later the police approached the car and R.C. sped off and police gave chase."

Based upon the Seaman statement and through arrangements between Bennett's current attorney and the Queens District Attorney's Office, Mr. Seaman was interviewed by the Queens District Attorney (September 24, 1984). Seaman indicated that he saw Bennett and Julian Ishmael leave the blue car sometime around 8:30 P.M. on January 31, 1983 (some three hours to three and one-half hours prior to the shootout chase). In furtherance of the District Attorney's investigation, Seaman was given a lie detector test. His test performance was reported as being "poor" and "highly deceptive."

The District Attorney further, in the presence of the defendant's current attorney, interviewed Bennett's sister, Rose Powell. She indicated that at some time on January 31, 1983, at approximately 10:15 P.M., while she was coming home from a neighborhood store, she saw her brother and Julian Ishmael, the alibi witness that did testify. She indicated that she spoke to her brother about his wife's efforts to locate him, and that her brother said to tell his wife he was going to Ishmael's house. She had no idea where her brother went after 10:30 P.M.

ABORTED HEARING

After noting the corporative and diligent investigatory followup which had accompanied the consideration of his motion, this court, at an anticipated hearing on September 25 1984, inquired as to whether Bennett wished "to give a statement under oath" with respect to the facts that he had set forth in his letter to the court from Rikers Island (May 5, 1984), or as to any of the facts that were brought forth in the Seaman statement (September 14, 1984). After consultation with is current attorney, Bennett said, "I prefer not to." The court then stated: "All right, you understand I am giving you the opportunity Mr. Bennett?" Bennett responded: "I understand." With a feeling of obvious frustration and dissatisfaction, this court then concluded the hearing, and denied Bennett's motion to set aside the verdict. It thereafter proceeded to sentence Bennett.**

GENERAL PRINCIPLES GOVERNING MOTIONS TO SET ASIDE A VERDICT

The grounds to set aside or modify a verdict, after a verdict's rendition, but, before sentence, are set forth in CPL 330.30. The proscribed procedure in making such motion is set forth in CPL 330.40. Such motion to set aside is addressed to the sound discretion of the trial court (People v Heuvel, 32 AD2d 993, 302 NYS2d 47 [3d Dept, 1969]; People v Palumbo, 282 AD 1059, 126 NYS2d 381 [2d Dept, 1953]). Its prime objective is to give the trial court, which is more familiar with the trial record, an opportunity to correct, modify or amplify a trial ruling or explain some of trial activity. Of equal importance is the perfection and supplementation of the trial record for eventual consideration by an appellant court.

It seems clear that a motion to set aside or modify a verdict becomes part of the appeal papers and that realistically, any denial will likely result in an appeal after judgment by the defendant, while the graning of any relief an appeal by the District Attorney (People v Daniels, 48 AD2d 905, 369 NYS2d 771 [2d Dept, 1975]; People v Mangano, 28 Hun 259, 1 NY Cv R 411).

Under such predictable circumstances, it would seen that any such motion should not be either perfunctorily made, or considered (People v Spiegel, 149 Misc 439, 267 NYS 512 [New York County, 1934] Rather, a trial court, presented with such a motion, has the responsibility of undertaking a careful review of the grounds raised and upon reasonable notice to and a fair opportunity to be heard by all concerned should see that substantial justice be done (People v Jones 115 NYS 800, affd 194 NY 83, 86 NE 810, 23 NY Cv R 178). When justified, an evidentiary hearing should be conducted by the court to inquire into any disputed or underdeveloped factual issues or other matters raised by the motion (People v Cadby, 75 AD2d 713, 427 NYS2d 121 [4th Dept, 1980]).

INEFFECTIVENESS OF COUNSEL IN NOT RELYING EXCULPATORY INFORMATION TO THE DISTRICT ATTORNEY

Bennett's contention that his trial attorney did not effectively defend him by not relaying exculpatory information about Cephus and Whitehurst being in the blue car, would seem to be a contention which can properly be raised by a motion to set aside a verdict pursuant to CPL 330.30(1). The catch-all first subdivision of CPL 330.30 authorizes the setting aside of a verdict during the period between verdict and sentencing upon any ground appearing in the record, which, if raised upon appeal

from the propsective judgment of conviction, would require a reversal of the judgment as a matter of law by an appellate court.

The factual difference between Bennett and his trial attorney, about when Bennett revealed the information about Cephus and Whitehurst (before trial or after verdict), justified the holding of an evidentiary hearing to inquire into thi disputed matter. Such a hearing was scheduled and adjourned. However, when Bennett eventually declined to proceed at the evidentiary hearing, or amplify upon his letter of May 5, 1984, this court found itself in the position where it could not develop the disputed issue any further. Accordingly, no further hearings were scheduled to inquire into the position of Bennett's trial attorney (letter of May 10, 1984), that the information about Cephus and Whitehurst had been made available to him for the first time by Bennett ten minutes after the adverse jury verdict (contra, People v Swanston, 13 Misc 2d 840, 181, NYS 395 [Bronx County, 1958]).

NEWLY DISCOVERED EVIDENCE
(CPL 330.30[3])

The discretionary power to grant a motion to set aside a verdict after rendition but before sentence, and to order a new trial on the ground of newly discovered evidence is now statutorily defined (CPL 330.30[3]; People v. Hazelton, 58 AD2d 945, 397 N.Y.S.2d 199). This subdivision, which codifies the requirements of "newly discovered evidence: set forth earlier by the Court of Appeals, in People v Salemi (309 NY 308, 215, 128 NE2d 377 [1955]) is quoted in total:

> "3. That new evidence has been discovered since the trial which could not have been produced by

> the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant."

It seems quite clear that a court's discretionary power should be exercised in granting a motion on the grounds of newly discovered evidence, and also in the interests of justice, only when the requirements of the statute have been satisfied. This satis-faction must be established by the defendant, proving the grounds of "newly discovered evidence" by a preponderance of the evidence (CPL 330.40[2][8]; People v Kehler, 28 NYS2d 71 [Kings County, 1941]).

These grounds, as related to Bennett's motion will be dealt with separately below.

In summary, to qualify as "newly discovered evidence," the offered evidence must meet the trhee criteria of CPL 330.30(3).

(1) It must have been discovered since the trial;

(2) It must have been such as could not have been discovered before trial by the exercise of due diligence; and

(3) It must be such as would probably (not possibly) have made the verdict more favorable to defendant (change the result).

(People v Salemi, supra; Bellacosa, Practice Commentary 330.30, McKinneys Criminal Practice Law, vol 11A, pp. 47-48).

In this court's opinion, the evidence concerning Cephus and Whitehurst, and/or the information concerning Bennett and the alibi witness, Ishmael, being in the car prior to the shoutout chase (contrary to their trial testimony), does nto satisfy any of the three criteria necessary to qualification as "newly discovered evidence."

As to criteria (1) and (2) - Bennett's letter of May 5, 1984 indicates that he knew about the Cephus-Whitehurst involvment prior to trial. A defendant who withholds evidence during trial is not entitled to a new trial by subsequently relying on the evidence withheld (People v Missina, 73 AD2d 899, 424 NYS2d 219 [1st Dept, 1980]), nor can it be argued under such circumstances that it constitutes newly revealed evidence available for the first time (People v Stokes, 83 AD2d 968, 443 NYS2d 12 [3d Dept, 1981]).

As to criteria (3) - the level of the Cephus-Whitehurst involvment - their being in the blue car some time after it was stolen on the day in question - does not create a probability that such evidence, if it had been received at the trial, would have resulted in a more favorable verdict regarding Bennett (People v Lane, 88 AD2d 655 [2d Dept, 1982]). The prime question remained, after Cephus-Whitehurst, as to who was in the blue car at the time of the shootout chase. In the court's opinion, the jury, based upon the testimony of the two policemen involved, had ample evidence to conclude that Bennett was the shooter in the back seat, regardless of the fact that no fingerprints of Bennett's were found in the car as were Cephus' and Whitehurst's.

FAILURE TO ALLOW EXTENTION OF ALIBI WITNESS TO TESTIFY

In urging error by this court, Bennett relies upon the 1979 decision of the Appellate Division, First Department, in People v Cuevas (67 AD2d 219 [225-226). This court was familiar with and had reviewed Cuevas prior to making its trial ruling. It was this court that brought Cuevas to Bennett's trial attorney's attention in a post conviction conversation.

In both Ceuvas as in this case, there was a failure by defense counsel to include the name of a prospective extension of alibi witness in the pretrial notice required to be served pursuant to CPL 250.20.

Bennett here contends that reconsideration of Cuevas should lead this court to hold that the witness Muhammad, who lived across from the site where the chase ended, was improperly excluded, and that accordingly, the verdict should be set aside. While both this case and Cuevas involved an "extension of alibi" witness who was allegedly in the defendant's presence a short time after the time of the crime, there are distinguishable fact patterns and overriding factors which differentiate the two cases.

In Cuevas, there was an improper restriction in the redirect examination of a witness. This restriction was a great prejudice to defendant there. No such error is alleged to have been made in the instant case.

Secondly, in Cuevas, the defendant was not even allowed to mention the name of his potential alibi witness, whereas in the instant case, Bennett was allowed to testify in depth about the excluded witness, Mr. Mohammad, who lived

across the street from the end of the car chase site. Furthermore, Mohammad was actually present in the courtroom during trial, within full view of the jury, and he even stood and acknowledged the defendant's identification of him.

Thus, based upon CPL 330.30(1) and a review of the relevant portions of the trial record, this court must conclude that it is not required to set aside a verdict unless, as a matter of law, an error was made requiring reversal upon appeal. In Cuevas, a combination of trial errors were present. No such ground or justification has been presented here.

CONCLUDING OBSERVATIONS

Based upon the trial testimony and post-trial motion record, it is this court's opinion that bennett knew more about the shootout chase than he or his alibi witness, Julian Ishmael, were willing to testify to at the trial. That it was only after the adverse verdict that Bennett felt the necessity to implicate Cephus and Whitehurst. In all probability, Whitehurst-Cephus-Bennett and Ishmael were in the car - but who was in the car during the shootout chase? As a note of caution, a post-trial motion to set aside a verdict can have perilous fallout effects over and above generating an initial decision by the trial court. Arguments advanced and matters brought forth can, in a very real way, undermine or bolster a trial record and can become the subject matter of appellate concern.

Matters raised on this motion have affected the credibility of witnesses who testified, thus contradicting their positions taken at trial. For example, Bennett and his alibi witness, Julian Ishmael, testified at trial that their only knowledge of or connection with the car chase incident was that they observed police action one hour after the chase concluded

from in front of Mr. Muhammad's home. (The alleged importance of the extension of alibi witness contention, supra.) Bennett's revelation about his pretrial knowledge of Cephus and Whitehurst being in the car was at odds with his trial testimony, which indicated no knowledge or involvment concerning the later car incident or its involvment in a police chase. Further, the Seaman statement involved both Bennett and his alibi witness, Ishmael, with the blue car, thus contradicting both the testimony of Bennett and Ishmael about any involvment with the blue car. Finally, the contention of Bennett's sister, Rose Powell, that she saw her brother and talked to him at about 10:30 P.M. on the evening of the incident, was not constant with the testimony of either Bennett or Ishmael, which placed both at Ishmael's home at that time and Included no street encounter that evening with anyone, including Rose Powell.

Accordingly, and for all the reasons stated above, Bennett's motion is denied in all respects.

Short form order signed herewith.

The clerk of the court is directed to mail a copy of this decision and order to the attorney for the defendant and to the District Attorney.

Long Island City
New York
December 1, 1984

William D. Friedmann
J.S.C.

FOOTNOTES

*

Defendant Bennett and codefendant Derrick Chisholm were charged with:

Attempted Murder in the First Degree (2 counts);
Attempted Murder in the Second Degree (2 counts);
Criminal Possession of a Weapon in the Second Degree;
Reckless Endangerment in the First Degree (2 counts);
Criminal Possession of Stolen Property in the First Degree; and
Unauthorized Use of a Motor Vehicle in the Third Degree.

**

Attempted Murder in the First Degree (2 counts) - 15 years to life;
Criminal Possession of a Weapon in the Second Degree - 5 years to 15;
Criminal Possession of Stolen Property in the First Degree - 2 1/3 to 7;
Unauthorized Use of a Vehicle in the First Degree - 1 year.

***

On or about November 5, 1984, after sentence but before the written formal decision, Bennett again wrote directly to the court. Again, comment was requested from all the attorneys involved, both past and present. Both Bennett's post-trial attorney and the District Attorney termed his letter as containing nothing "new." This court's review confirms that nothing new has been presented and therefore it will not give the letter any further attention, but will make it, and the response thereto, part of the court's record for possible appellate consideration.

SUPREME COURT : STATE OF NEW YORK
QUEENS COUNTY : CRIMINAL TERM :PART J-6

PRESENT :

Hon. WILLIAM D. FRIEDMANN,
Justice

THE PEOPLE OF THE STATE OF NEW YORK,

Indictment No. 842/83
MOTION to Vacate

-against-

TONY BENNETT,

Submitted _____
Argued _____
Hearing _____

Defendant.

The following papers numbered
1 to ___ submitted in this motion

PETER J. AVENIA, ESQ.
FOR THE MOTION

RICHARD A. BROWN, D.A.,
Queens County

BY: SEYMOUR ROTH, ESQ.
A.D.A.
OPPOSED

Papers Numbered

Notice of Motion and Affidavits annexed ____ _____
Answering and Reply Affidavits _____ _____
Exhibits _____ _____
Minutes _____ _____
Other _____ _____

Upon the foregoing papers, the motion is denied to the extent of the annexed memorandum decision.

GRANTED
DATE: August 2, 1991

_____
WILLIAM D. FRIEDMANN,
J.S.C.

SUPREME COURT,
QUEENS COUNTY
CRIMINAL TERM, PART J-6
- - - - - - - - - - - - - - - - - - - -X
THE PEOPLE OF THE
STATE OF NEW YORK

BY: WILLIAM D. FRIEDMANN, J.

-against- DATED: AUGUST 2, 1991

TONY BENNETT, INDICTMENT NO. 842/83

Defendant.
- - - - - - - - - - - - - - - - - - - -X

APPEARANCES

FOR THE MOTION:

PETER J. AVENIA, ESQ.
ATTORNEY for Defendant
65 South Street #8
Northampton, Massaschusetts 01060

IN OPPOSITION:

RICHARD A. BROWN
District Attorney, Queens County
BY: SEYMOUR ROTH, ESQ., A.D.A.
For the People
125-01 Queens Boulevard
Kew Gardens, New York 11415

SUPREME COURT,
QUEENS COUNTY
CRIMINAL TERM, PART J-6
- -X
THE PEOPLE OF THE STATE
OF NEW YORK

BY: WILLIAM D. FRIEDMANN, J.

-against- DATED: AUGUST 2, 1991

TONY BENNETT, INDICTMENT NO. 842/83

Defendant.
- -X

Defendant moves this court, pursuant to CPL Section 440.10, to vacate his judgment of conviction, inter alia, of Attempted Murder in the First Degree, upon grounds of newly discovered evidence and ineffective assistance of counsel. For reasons set forth below, the motion is denied in its entirety.

I.

HISTORY OF THE CASE

This is the latest (but most certainly not the final) chapter in the saga of Tony Bennett, see, (People v. Bennett, Ind. No. 842/83, 1211/84 (unpublished decision); the prior decision denying defendant's motion to dismiss pursuant to CPL 330.30, People v. Bennett, 128 AD2d 540, 512 N.Y.S.2d 472 (1987) Lv. denied. (The conviction was affirmed by Appellate Division).

A. THE FIRST TRIAL - On February 1, 1983, a car chase "worthy of a movie or T.V. script" took place through the streets of Queens, New York. (Citation omitted)

During the chase, the occupants of the car fired several shots at pursuing police officers. Finally, its occupants exiting with the car still in motion, fled into the surrounding area and avoided police capture (but only temporarily). The police officers had clearly seen the occupant of the back seat of the car and identified him as being the defendant, Tony Bennett.

At trial the defendant took the witness stand in his own defense and categorically denied ever being in the vehicle from which the shots were fired at the police. The defendant presented an elaborate explanation to account for his whereabouts during the time in question stating he was with a friend, drinking, napping and watching television.

The police officers testified that they were certain Tony Bennett was in the vehicle and that he had fired the shots at them.

The jury, in an obvious show of disbelief in the defendant's testimony found the defendant guilty of Attempted Murder in the First Degree (Two Counts); Criminal Possession of a Weapon in the Second Degree; Reckless Endangerment in the First Degree (Two Counts), Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Vehicle in the Third Degree.

B. POST TRIAL MOTION - Following trial, but before sentence, Bennett's trial attorney filed a written notice to set aside the jury verdict pursuant to CPL 330.30. Subsequently adopted by Bennett's second attorney, the motion relied upon

People v. Cuevas (67 AD2d 219, 225-226 [1st Dept. 1979]). It alleged the trial court committed reversible error when this court refused to permit Bennett to call as a post event or extension of "alibi" witness, one Mr. Elias Muhammad (he allegedly saw Bennett and his alibi witness in front of his house one hour after the chase ended). Muhammad's name had not been included in the alibi witness notice required under CPL 250.20. (Trial transcript of March 26, 1984 - Colloquy pp. 32-42).

The second ground to set aside the verdict arose out of a post conviction letter (May 5, 1984), from Bennett to the court, setting forth (a) differences with his trial attorney, and (b) the existence of relevant exculpatory evidence not revealed to the District Attorney or used at the trial, (CPL 330.30(3)).

In essence, Bennett contended that prior to trial he gave the names of Ronald Cephus and Ricky Whitehurst to his trial attorney as the two persons that he had been told remained in the blue car at the time of the shootout car chase, that this information had not been transmitted to the Queens District Attorney's Office. Bennett's letter was circulated to all counsel for comment and followup. By letter (May 10, 1984), Bennett's former trial attorney indicated that the names of Cephus and Whitehurst had been brought to his attention by Bennett, for the first time, approximately ten minutes following the adverse jury verdict* That it was later confirmed to him by Bennett's sister and wife when he took them home after the verdict. Bennett's second attorney, by letter (May 15, 1984), urged that in the interests of justice that the contents of Bennett's post conviction

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* Inasmuch as Bennett is a self-admitted perjurer, (see letter infro pg 7), this court finds the attorney's account to be credible and gives much weight to his account of events.

letter (May 5, 1984), be considered as part of the then pending motion to set aside the verdict. The District Attorney's Office consented to this procedure.

C. FOLLOW UP EVENTS - The District Attorney's office opposed the first branch of Bennett's motion which alleged that the court erred in failing to allow the post even witness, Mr. Muhammad, to testify. It further, at the court's request, conducted an investigation to determine whether Ronald Cephus and Ricky Whitehurst, as related by Bennett, were involved with the blue car which was the subject of the shootout chase. Credibility of the information, supplied by Bennett, was somewhat bolstered when fingerprints of both Cephus and Whitehurst were lifted from items recovered in the blue car. This established that probably Cephus and Whitehurst were in the car some time after it was stolen, in Bronx County, during the early part of the day of January 31, 1983.

However, the question still remained unanswered as to who remained in the car during the chase and shooting sequence, comprising the period between 12:19 and 12:22 to 12:24 A.M. in the early morning hours of February 1, 1983.

Upon receipt of the information placing Cephus and Whitehurst in the blue car, this court set the matter down for an evidentiary hearing to inquire into the following: (a) the alleged difference between Bennett and his trial attorney regarding information about the involvement of Cephus and Whitehurst, (b) who were the four persons in the blue car when the police made their first pass? (c) who got out of the car during its early pursuit and who remained during the chase and shooting? and (d) what was the source of the information underlying (a) - (c)?

In the interests of justice and to enable both Bennett's

second attorney and the District Attorney to conduct further investigations, to evaluate potential evidence, and secure witnesses, including Cephus and Whitehurst, various hearing adjournments were granted (at the time both Bennett and Cephus were reported to be incarcerated).

During the period, a written statement from one Alfred Seaman was presented by Bennett's second attorney (September 14, 1984). In essence, it contended that Seaman saw Cephus, Whitehurst, Tony Bennett and Bennett's alibi witness, Julian Ishmael, who testified at the trial, sitting in the blue car. Part of Seaman's statement stated: "A few moments later I saw Tony and Ishmael get out of the car and R.C. and Lil Rickey remained inside the car. A few moments later the police approached the car and R.C. sped off and police gave chase."

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The District Attorney further, in the presence of the defendant's second attorney, interviewed Bennett's sister, Rose Powell. She indicated that at some time on January 31, 1983, at approximately 10:15 P.M., while she was coming from a neighborhood store, she saw her brother and Julian Ishmael, the alibi witness that did testify. She indicated that she spoke to her

brother about his wife's efforts to locate him, and that her brother said to tell his wife he was going to Ishmael's house. She had no idea where her brother went after 10:30 P.M.

D. ABORTED HEARING - After noting the cooperative and diligent investigatory followup which had accompanied the consideration of this motion, this court, at an anticipated hearing on September 25, 1984, inquired as to whether Bennett wished "to give a statement under oath" with respect to the facts that he had set forth in his letter to the court from Rikers Island (May 5, 1984), or as to any of the facts that were brought forth in the Seaman statement (September 14, 1984). After consultation with his second attorney, Bennett said, "I prefer not to." The court then stated: "All right, you understand I am giving you that opportunity Mr. Bennett?" Bennett responded: "I understand." With a feeling of obvious frustration and dissatisfaction, this court then concluded the hearing, and denied Bennett's motion to set aside the verdict. (Citations ommitted)

It should be noted that this court's frustration and dissatisfaction was generated not by belief in Bennett's innocence but by the recognition that Mr. Bennett might have perjured himself before his court and thus may have contributed to obstructing this court's role in seeking a truthful account of the events of March 28, 1984. This belief (that the defendant had perjured himself) was confirmed when this court came into receipt of a notarized letter from Tony Bennett and Ronald Cephus dated April 12, 1985, which reads as follows:

"This is concerning the incident that happened on the night of January 31, 1983. it involved four people before the alleged crime that one of the four was eventually charged with it one month after the commission. we were sitting in the auto

on rockaway blvd. julian ishmael, ricky whitehurst, tony bennett, ronald cephus. the car was spotted by a unmarked patrol car. after about 5 minutes we decided to leave the area before doing so one person left the vehicle. tony b. bennett and proceeded to walk away. it was (three) of us left in the car when we started to drive down Rockaway blvd. the vehicle that the police were riding in was coming on the other side of the street and after noticing us made a u-turn and came behind the vehicle. after stopping on the corner of Rockaway and 134th ave. another person left the vehicle julian ishmael. we than left the area and went on our way, the police vehicle didnot stop us to question our activities. there was no-shots fired by anybody in the auto. the firing was done by the police who had no probable caused to act in this manner. i am aware of my fingerprints being in the auto this was discovered after i was mentioned as one of the remaining occupants in the auto. I was asked by the person who was charged to relay this story to the lawyer assigned to handle the motion he is seeking to present when the stories of the ones involved reach the lawyer. We both agreed Upon this, and signed our names on the bottom." (See Appendix 1)

This notarized letter is directly at odds with Mr. Bennett's trial testimony that he was at Julian Ishmael's house and that he was never present in the automobile from which the shots were fired and as such is an indication that Mr. Bennett has perjured himself at least once. Interestingly, if there is yet a true third story which has yet to be told, Mr. Bennett may have perjured himself twice.

F. THE APPEAL - On appeal, People v. Bennett, 128 AD2d 540 (1987), the defendant contended, inter alia, that htis court committed reversible error by not allowing the defendant to call a witness who would have testified he saw the defendant approximately one hour after the time in question. Id.

The Appellate Division, Second Department, while agreeing with the defendant's contentions stated, "inlight of the overwhelming evidence of guilt, this testimony concerning the defendant's presence near the scene of the crime approximately one hour after its commision was harmless beyond a reasonable doubt". Id (emphasis supplied).

The court went on to hold, "[w]e have examined the defendant's remaining contentions and find them to be without merit". Id at 541.

II.

DEFENDANT'S PRESENT MOTION

On May 28, 1991, defendant's current attorney moves this court pursuant to C.L. 440.10 for an order vacating the judgment heretofore entered against the defendant upon the grounds of newly discovered evidence, prosecution's erroneous statement during summation, and ineffective assistance of counsel. The court deals with these arguments sereatim.

A. NEWLY DISCOVERED EVIDENCE

The "newly discovered" evidence comes to this court in form of defendant's present willingness to tell the "truth" about the events of January 31, 1983. This new "truth" is directly opposed to old "truth" which the defendant testified to at his first trial. This new "truth" is bolstered by an affidavit from Julian Ishmael in which Mr. Ishmael states he was with Tony Bennett the day of January 31, 1991 inside the automobile from which the shots were fired and that Tony Bennett couldn't have fired the shots because Bennett was the first to exit the automobile (before the chase began). It should be noted that

Mr. Ismael also "bolstered" Mr. Bennett's testimony at trial when Ismael denied he and Bennett were ever inside the automobile. This court supposes Mr. Ismael will state the facts in whatever form he feels is most advantageous for Mr. Bennett and as such, this court gives his affidavit little if any weight.

Assuming arguendo this court did give the statements of Bennett and his accomplice great credence, defendant argues that this qualifies as "newly discovered" evidence and as such this court should vacate the judgment against the defendant. The test for "newly discovered" evidence was enunciated by the Court of Appeals in People v. Salami, 309 NY 208, 215-216 (1955), cert. denied, 350 U.S. 950 (1956).

"Newly-discovered evidence in order to be sufficient must fulfill all the following criteria: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting the former evidence." Id. (emphasis supplied).

Defendant contends that this "newly discovered" evidence meets all but the second criteria, i.e. - it must have been discovered since the trial. Defendant further contends that the failure to meet the second criteria is only technical and as such this court should overlook this technicality in the interest of justice. This court does not agree with the defendant's assessment. The criteria laid down in Salami are sini que non, the failure to satisfy just one criteria would be fatal, here, the defendant fails to meet at least four of the criteria. He fails to meet criteria one in that if a new trial were granted the result could probable not change. The reasoning for this is that the

jury obviously placed great weight on the police identification of Bennett as the shooter, this despite Mr. Bennett's and Mr. Ismael's denial of their ever being in the car. Surely the jury would not think them innocent when with the new testimony they place themselves inside the vehicle (which would put them closer to the scene of the crime). Also no rational juror would find either Bennett's or Ismael's new testimony credible in light of their prior perjury.

Defendant fails to meet criteria two or three in that the evidence was always available to the defendant, in fact the defendant was given ample opportunity to present this evidence and instead chose to perjury himself. If this court were to rule any other way on this point the result, from a public policy point of view, would certainly be disastrous. Firstly, defendants would be encouraged to withhold information from counsel and to perjure themselves before the court. Secondly, the courts would be clogged with defendants who intentionally have given information incrementally and who then motion the court for a new trial on each "new revelation" they deem to share with the court.

This court finds that the defendant "having knowingly and willingly participated in an attempt to obstruct justice through perjured testimony, [he] is not now in a position to ask this court to undo the consequences of his own conscious wrongdoing", People v. Avery, 129 AD2d 853, 857 (1987), see (People v. Nelli, 29 AD2d 725, 726 (1968)).

Finally, the defendant fails to meet criteria 6 in that it is required that the new evidence must not be merely impeaching or contradicting the former evidence. Clearly this new testimony is just contradicting the police officer's testimony that Bennett remained inside the vehicle and in fact this testimony

also contradicts defendant's former testimony. The court now moves to defendant's second argument.

B. PROSECUTION'S ERRONEOUS STATEMENT DURING SUMMATION

Defendant contends that at trial the prosecutor made two highly improper and prejudicial comments. The first comment was that defense counsel had admitted Tony Bennett's involvement in the crime was the second comment suggested to the jury that it had no choice but to find that the defendant intended to kill the two officers. Assuming arguendo, we agreed with defendant's contentions, "the judgment of conviction may not now be vacated by coram nobis, since such error could have been reviewed on the appeal which defendant had taken from the judgment". People v. Cantaldo, 15 AD2d 566, 222 NYS2d 741, (1965) affirmed 11 NY2d 982, 229 NYS2d 423, 186 N.E.2d 125.

This brings the court to defendant's final argument.

C. INEFFECTIVE ASSISTANCE OF COUNSEL - Defendant's present counsel contends that defendant's previous counsel individually and collectively provided ineffective assistance of counsel. Defendant's current counsel cites two critical junctures as which defendant was denied effective assistance of counsel. The first occurred at trial when counsel failed to object when the prosecutor made improper comments during summation. The second occurred when counsel advised Bennett not to testify at the hearing of September 25, 1984. Defendant contends that this ineffective counsel equals the denial of counsel in violation of rights guaranteed by both the United States and New York Constitutions. U.S. Const. 6th Amend.; N.Y. Const., Art. I Section 6.

Once again this court cannot agree with defendants contentions. Firstly, as stated above, defendant's objections to prosecutor's statements should have been brought up on appeal. Secondly, if defendant had exposed his perjury at the hearing of September 25, 1984, this court would have looked on it as unfavorably then as it does now so former counsel was proper to advise defendant to remain silent. However, assuming arguendo, that present counsel is correct in that what he describes is ineffective assistance of counsel this court would still not provide relief. "[A]bsent an indication that counsel, even if assigned by the court, was unfit to defend the accused or that the representation was such as to make the trial a farce and a mockery of justice, a judgment of conviction may not be vacated on a claim that counsel was incompetent." People v. Lester, 10 AD2d 971, 202 NYS2d 385 (1960). See also, People v. Brown, 7 NY2d 359, (1960) People v. Lee, 4 AD2d 770, (1959) affd 4 NY2d 843. So even if counsel was ineffective, this court finds the trial was not reduced to the level of farce or mockery of justice.

III. CONCLUSION

In conclusion this court has found all of defendant's contentions to be without merit and as such, this court sees no reason to disturb the jury's finding of guilt and this court's subsequent sentences.

Therefore, the motion to vacate the judgment is denied in its entirety.

Order granted accordingly.

The clerk of the court is directed to mail a copy of this memorandum and order to the attorney for the defendant and to

the District Attorney.

WILLIAM D. FRIEDMANN, J.S.C.

April 12, 1985

Dear MR. LANDAU,

This is concerning the incident that happened on the night of January 31, 1983m. it involved four people before the alleged crime that one of the four was eventually charged with it one month after the commission. we were sitting in the auto on rockaway blvd. julian ishmael, ricky whitehurst, tony bennett, ronald cephus. the car was spotted by a unmarked patrol car. after about 5 minutes we decided to leave the area before doing so one person left the vehicle. tony b. bennett and proceeded to walk away. it was (three) of us left in the car when we started to drive down Rockaway blvd. the vehicle that the police were riding in was coming on the other side of the street and after noticing us made a u-turn and came behind the vehicle. after stopping on the corner of Rockaway and 134th ave. another person left the vehicle julian ishmael. we than left the area and went on our way, the police vehicle didnot stop us to question our activities. there was no-shots fired by anybody in the auto. the firing was done by the police who had no probable cause to act in this manner. i am aware of my fingerprints being in the auto this was discovered after i was mentioned as one of the remaining occupants in the auto. I was asked by the person who was charged to relay this story to the lawyer assigned to handle the motion he is seeking to present when the stories of the ones involved reach the lawyer. We both agreed upon this, and signed our names on the bottom.

Very TURLYY YOURS
Tony B. Bennett

Very Turly Yours,
Ronald Cephus

Sworn to before me this 16th day
of April, 1985

_____
Notary Public
Carol M. Griffith

STATE OF NEW YORK :
SUPREME COURT
COUNTY OF QUEENS :
Criminal Term

The People of the State
of New York,
Respondent,

-against-

NOTICE OF MOTION

Ind. #842/83

TONY BENNETT,
Defendant.

SIR(s):

PLEASE TAKE NOTICE that upon the duly verified petition of Tony Bennett, the petitioner herein and upon all prior pleadings and proceedings heretofore had herein, the petitioner respectfully shows to this court and seeks the following relief;

DATE AND TIME OF MOTION: June 26, 1995, at 9:30 a.m. or as soon thereafter as the petitioner can be heard.

PLACE OF MOTION: 125-01 Queens Blvd.
Supreme Court County of Queens
Kew Gardens, N.Y. 11415

OBJECT OF MOTION:

Pursuant to Article 400.10 § 440.10, 1(b)(c)(f)(h), § 440.30 (5)(6)(7), Title 28 USC §2254 Article 440 of the C.P.L. and the petitioner evokes his Statutory Right to be present at such hearing.

To: Supreme Court Clerk
125-01 Queens Blvd.
Kew Gardens, N.Y. and
District Attorney of
Queens County.

Yours, etc:

_____

TONY BENNETT
88-A-6051 Pro Se
Drawer B
Stormville, NY 12581-
0010

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
ss.:
COUNTY OF DUTCHESS)

I Tony Bennett, being duly sworn deposes and says;

That I am the petitioner herein and that I was the defendant in the case of The People of the State of New York against Tony Bennett-Indictment number 842/83.

That the parties and the indictment remain the same except that the codefendant Derrick Chisholm was found not guilty and the charges therein was dismissed based upon that verdict.

That this motion is brought pursuant to State and Federal requirements based upon Article 440.10,1(b)(c)(f)(h), 440.30 (5)(6)(7) of the Criminal Procedure Law and Title 28 USC § 2254 of the United States Codes Annotated.

That a Federal question of Law and Fact requires that the defendant in a Criminal Case first bring the issue's on a Article 440 to exhaust those issue's that have been brought on Direct Appeal and found to be without merit, the recent changes in the law as it relates to the harmless error doctrine which would pertain to Article 440.10, 2(a) with the relevant change in the law as it relates to prior decisions by the courts in the State of New York.

That the court and the prosecutor violated the petitioners Federal Constitutional Rights under the VI and XIV §I of the United States Constitution by denying the petitioner his

right as a Criminal defendant to have a witness testify at his trial and the prosecutor knew that the testimony would have been unfavorable to the people and would have proved that the petitioner was not guilty of the criminal charges against him and that said charges where in fact manufactured by police against the petitioner and an unlikely co-defendant.

Under the 6th and 14th Amendment of the United States Constitution a defendant in a criminal case has a Right to a (fair) trial by a jury and the Right to present witnesses in his defense and the Right to confront and cross examine adverse witnesses against him.

The petitioners Right both Statutory and Constitutional was violated by a last minute tactic by the prosecutor at the end of trial by excluding a very important defense witness on the pretext that the prosecutor was not properly served with a Notice of Alibi as to the witness Mr. Mahammed. Through out trial the prosecutor conceded to two alibi witnesses, let Mr. Mahammed be sworn as a witness in the face of the jury, and then the court placed Mr. Mahammed under " Court - Order " to be back in court on Monday [ie;see page 35 of trial transcript March 22, 1984] and the witness Mr. Mahammed was present during the whole trial subject to court order, and when counsel was precluded from calling the witness, the court offered the prosecution still a chance to call mr. Mahammed, the prosecutor refused. Under § 250.20 and § 300.10 of the C.P.L, on March 21, 1984 [*T.T.page 6,21,24,26,27,-and March 22,1984 T.T. pages 31,32,34,35] the prosecutor knew before the witnesses were to testify that they were going to be called, unless the prosecutor can show a prejudice to the people's case, then the court is required to weigh the prejudice to the defendant, this was not done.

The court merely cured this oversight of counsel or the prosecutor by excluding the Alibi witness. Counsel as informed as the prosecutor was and any oversight would have been on the prosecutors office and not defense counsel, as counsel stated on the record that the prosecutors office was notified. Even assuming, that the witness Mr. Mahammed was an alibi witness, against the petitioners contention that Mr. Mahammed was merely a witness of the alibi witness due to the courts interested witness charge, Mr. Mahammed's testimony would only tend to substantiate the alibi witnesses testimony as to the whereabouts of the petitioner at the time that the crime was to have been committed as alleged by police.

New York State Constitution, under Article I§6 of the New York State Constitution, a criminal defendant is entitled to Due Process of the law. The petitioner did not receive Due Process of the law.

Amendment's VI, XIV of the United States Constitution, the petitioner has a Statutory and Constitutional Right to present witnesses in his defense, and the Right to Due Process, this was violated by the actions of the prosecutor and the court.

Harmless Error: Harmless Error Doctrine as defined in Black's Law Dictionary (6th Edition) as; An error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final out come of the verdict of the trial, it is further regarded under Federal Criminal Procedure Rule 7(c), § 52, New York State Criminal Procedure Law § 250.20 which relates directly to Alibi witnesses. For the prosecutor throughout the trial, to say nothing and then after the witness was sworn in and questioned by the court, in the face of the jury

and then to have that witness excused and never testify at the trial, could only show why the petitioner was found guilty and the codefendant who presented no witnesses on his behalf, be found not guilty, surely showed that the jury was prejudiced by this act.

The court made Mr. Mahammed an extension of the Alibi witness and applied C.P.L, § 250.20 and not considering § 300.10 which placed the petitioner beyond a disadvantage when Julian Ishmael was the alibi witness, Mr. Mahammed was a witness as to how the petitioner got from Ishmael's house to the area of the crime, to exclude Mr. Mahammed as a witness places both the petitioner and Ishmael in the area with nothing further, thus, under the theory of People v. Cuevas,- 67 A.D.2d 219, and Smith vs. United States, 360 U.S.1,6, People v. Lilley, 141 A.D.2d 849, People v. Dillard, 96 A.D.2d 112, and People v. Josan, 92 A.D.2d 902, the petitioner was precluded based upon the failure of the prosecutor to be notified or the prosecutor misrepresented the facts to the court, either one occurred which taken by the jury and with no explanation of the completed facts, and without the witness Mr. Mahammed to complete the testimony was a sure conviction for the prosecution, Thus, if counsel was negligent in his duties to the petitioner, then the issue would more properly have been to hold counsel in violation under People v. Barret, 145 A.D.2d 842, and the court should have looked closer at the identical case of **People v. Loprimo**, 69 A.D.2d 890.

The court in People v. Bennett, 128 A.D.2d 540, conceded to the fact that Loprimo (Supra) was in use at the time but, that the Loprimo case did not apply to the petitioners case due to the overwhelming evidence. The overwhelming evidence was the same for the codefendant that was found not guilty at the same trial, the same testimony, the same evidence, the same

judge, the same jury. What was not the same that the witness was sworn in and asked questions by the court in front of the jury and told to come back under court order, Loprimo did not have the benefit of actually having the witness take the oath in front of the jury and then disappear from testifying and the court failing to give curative instructions to the jury all assured the prosecution atleast one conviction, that of Tony Bennett.

On page 312 of the trial transcript the following took place in the presence of the jury;

The Court: Next witness, please ?

Mr. Levine: Elias Mahamed.

ELIAS MAHAMED, resident of Queens County,was called as a witness on behalf of the defendant, Tony Bennett, after being duly sworn by the court clerk, testifies as follows:

Mr. Scarpa: Judge, at this time, I'd like to have an application heard at sidebar.

Mr. Scarpa: Judge, at this time, I'm compelled to ask counselor for an offer of proof. I have been served with a Notice of Alibi with only one alibi witness. I ask that this is –

Mr. Levine: He is not an alibi witness.

The prosecutor had ample time and could have made any application prior to the witness being sworn in front of the jury and failed to do so, after further colloquy the court ruled on page 314 that the defense could not use the witness. On page 322 the court ruled that the witness was an alibi witness and that the defense could not used Mr. Mahamed, and without any

curative instructions to the jury asked for another witness. The prosecutor should have been charged under People v. Bonaparte, 98 A.D.2d 778, for misconduct, as this was a violation of the petitioners 6th and 14th Constitutional Amended Right to present witnesses in his defense and with the prosecutor never mentioning the lack of notice prior to trial and leading the court to believe that nothing was wrong, the prosecutor had agreed on many occasions that he knew about a Alibi and a Rebuttal witness, and it was mentioned many times at trial about two defense witnesses and not one witness, **Witnesses** with a plural is more than one. The prosecutor was never misled by defense counsel, nor was defense counsel trying any dirty tactic's, surely, the defendant was placed at a disadvantage and this led to the defendants conviction of guilt based upon the action's of the Court and the prosecutor or in the alternative the lack of action by defense counsel. Whatever, the defendant should not have been charged with the loss of a witness. On page 363 the court said I gave you a ruling that I though was an appropriate one. I could very well have been wrong. This representation by the court was correct, the court was wrong, the prosecutor was wrong, and so was the Appellate Division wrong, this defendant has suffered for the past twelve years for this mistake and this motion must be granted based upon the facts and information herein, this would also give credence to Prosecutorial Misconduct (ie; see, People v. Woodhull, 105 A.D.2d - 815; People v. Mott, 94 A.D.2d 415).

The petitioner was denied his Right to be present at all material stages of the trial and the Right to be present at the Sandoval hearing and the Right to take part therein. On March 20, 1984, The court reporter noted that the defendant was not present and that the case was adjourned until March 21,1984, at that time the court reporter noted at page 4;

Appearances same as previously noted:

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No where in the record does it mention that the defendant Tony Bennett was present, and the only Sandoval issue that was discussed was the mention of a Y.O. and the decision was reserved by the court until trial, the decision was never made as to the petitioner Tony Bennett, nor was this issue ever brought up to the court nor to the Appellate Division. The petitioners Rights under People v. Sandoval-34 N.Y. 2d 371, was violated and the right under People v. Dokes, -79 N.Y.2d 656, People v. Favor, 82 N.Y.2d 254, People v. Kirkland,-188 A.D.2d 1083; People v. Dean, 188 A.D.2d 1082; In Dean Supra and Kirkland Supra, it is clear from the record and the court reporters transcription of the record that the petitioner was not present and could not take a meaningful participation in the alleged Sandoval hearing prior to trial, nor could the petitioner object to the courts decision to reserve same. The petitioners right to be present and to take part in the proceedings therein was clearly violated. This is just another denial of a Right by all concerned and it shows the disparity towards the petitioner by trial court and the prosecution.

With the issue's raised herein this petitioner seeks a hearing pursuant to § 440.30 (5)(6)(7) of the C.P.L, and Title 28 USC § 2254 as a federal Requirement for exhaustion of remedies there-of and that this court grant the relief herein requested to vacate the sentence and conviction which is by virtue of indictment 842/83 Attempted Murder 1°.

That the District Attorney shall be required to serve the petitioner at least 20 days prior to any scheduled hearing on this petition and that the petitioner reserves the right to file a reply

to the prosecutors answer herein. That the prosecutor be directed by this court to file Documentary Evidence in support of any Affirmation filed herein and if the facts are conceded that this court direct and file an order of Ad Testificandum In Personam with the Department of Correction and the Sheriff of Queens County Directing and the petitioner be brought before this court for the purpose herein.

VERIFICATION OF PETITION

STATE OF NEW YORK)
ss.:
COUNTY OF DUTCHESS)

That I Tony Bennett, being duly sworn says;

That I am the petitioner herein and that the facts as alleged herein are based upon personal knowledge from the records and that information is true and correct as stated herein.

Sworn to before me the 5th
day of June, 1995.

TONY BENNETT
Pro-Se
Drawer B
Stormville, N.Y.
12582-0010

Notary Public
EDWARD J. UHNAK

(EXHIBITS OMITTED)

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF QUEENS:
CRIMINAL TERM, PART L-4

THE PEOPLE OF THE STATE OF NEW YORK,	:	Return Date: June 30, 1995
Respondent,	:	AFFIRMATION IN OPPOSITION
-against-	:	TO DEFENDANT'S
TONY BENNETT,	:	MOTION TO VACATE
	:	JUDGMENT
Defendant.	:	Queens County Indictment No.
	:	842/83

STEPHEN ANTIGNANI, an attorney admitted to practice in the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affirmation in opposition to defendant's June 5, 1995 pro se application to vacate his conviction pursuant to C.P.L. § 440.10. I make the statements in this affirmation upon information and belief, based upon my review of the records and files of the Queens County District Attorney's Office.

2. On February 1, 1983, defendant was riding in the rear

seat of a stolen blue Chevrolet down Rockaway Boulevard. A police car followed the Chevrolet for a short distance, and then activated its red "fireball" light and its grill lights to signal the car to stop. The Chevrolet did not stop, and Police Officers William Cleaver and Kevin Perham began to chase the Chevrolet in their police car. During this chase, the Chevrolet made nine turns in an effort to "shake" the police, and defendant fired two shots at the police car, striking the car both times.

3. For these acts, defendant and the driver of the stolen Chevrolet were charged with two counts of Attempted Murder in the First Degree (Penal Law §§ 110.00/125.27[1]), two counts of Attempted Murder in the Second Degree (Penal Law §§ 110.00/125.25[1]), Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03), Criminal Use of a Firearm in the First Degree (Penal Law § 265.09[1]), Reckless Endangerment in the First Degree (Penal Law § 120.25), Criminal Possession of Stolen Property in the First Degree (Former Penal Law § 165.50), and Unauthorized Use of a Motor Vehicle in the Third Degree (Penal Law § 165.05).

4. On March 21, 1984, the trial court conducted defendant's Sandoval hearing, which, according to court records, defendant and counsel both attended.[1]

5. Defendant and his co-defendant, Derrick Chisholm, proceeded to trial and, on March 28, 1984, a Queens County jury convicted defendant of two counts of Attempted Murder in the First Degree, Criminal Possession of a Weapon in the Second Degree, two counts of Reckless Endangerment in the First Degree, Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Motor Vehicle in the Third

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[1] A copy of the "Court Sheet" is attached as People's Exhibit A.

Degree.[2] Chisholm was acquitted of all charges.

6. On or about April 24, 1984, defendant filed a motion to set aside the jury verdict pursuant to C.P.L. § 330.30, claiming that: (1) the trial court committed reversible error in refusing to allow defendant to call Elias Mahamed as a defense witness; (2) defendant and his trial attorney had differences with each other; and (3) there existed relevant exculpatory evidence not previously revealed to the prosecutor or utilized at trial. On February 1, 1985, defendant withdrew that application.

7. On September 25, 1984, defendant was sentenced to concurrent indeterminate prison terms of from fifteen years to life on the attempted murder counts. The court also imposed lesser terms on the remaining counts to run concurrently with the fifteen years to life sentences for attempted murder. Defendant is currently incarcerated pursuant to this judgment.

8. On or about March 28, 1986, defendant's assigned appellate counsel filed a brief on defendant's behalf in the Appellate Division, Second Department, raising the following issues: (1) that the court erroneously refused to allow a defense witness, Elias Mahamed, to testify despite the fact that defendant had failed to serve timely notice of alibi for Mahamed; (2) that the People failed to prove defendant's guilt beyond a reasonable doubt; (3) that the trial court improperly denied defendant's motion to set aside the verdict on the grounds of newly discovered evidence under C.P.L. § 330.30 without

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[2] The Criminal Use of a Firearm count had been dismissed by the People prior to the jury's deliberations.

conducting a hearing;[3] (4) that the two convictions of attempted murder in the first degree should be reversed because the People failed to prove beyond a reasonable doubt defendant's intent to cause death and his knowledge that the victims were police officers; (5) that the trial court erred in not suppressing the police officers' lineup identifications; and (6) that defendant's sentence was excessive.

9. On March 2, 1987, the Appellate Division, Second Department, unanimously affirmed defendant's conviction, finding that the court's error in precluding Mahamed's testimony was harmless beyond a reasonable doubt, that defendant's guilt had been proven beyond a reasonable doubt, and that defendant's remaining claims were meritless. People v. Bennett, 128 A.D.2d 540 (2d Dept. 1987). Defendant's appellate attorney subsequently sought leave to appeal to the Court of Appeals. On May 7, 1987, leave to appeal was denied. People v. Bennett, 69 N.Y.2d 1001 (1987) (Bellacosa, J.).

10. On May 7, 1991, defendant, through privately retained counsel, filed a motion to set aside his conviction pursuant to C.P.L. § 440.10, arguing: (1) that newly-discovered evidence justified a new trial; and (2) that trial counsel was ineffective. On August 2, 1991, this Court denied defendant's motion.

11. Defendant now moves, pro se, to vacate his conviction on the grounds that: (1) the court's refusal to allow Elias Mahamed to testify at trial was not harmless error; (2) the prosecutor's objection to Mahamed's testimony amounted to prosecutorial misconduct; and (3) defendant was denied his right

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[3] In fact, as explained above, the trial court never considered defendant's motion under C.P.L. § 330.30 because defendant withdrew it.

to be present at his Sandoval hearing.

12. As explained more fully in the attached memorandum of law, all of defendant's claims are procedurally barred. His first two claims are barred under C.P.L. § 440.10(2)(a), as having been previously determined on the merits upon an appeal from the judgment. Defendant's third claim is not only procedurally barred because it could have been raised either on direct appeal or in his prior 440 motion and is conclusively refuted by the record, it is also patently devoid of merit.

WHEREFORE, and for the reasons set forth in the accompanying memorandum of law, defendant's motion to vacate his judgment of conviction should be summarily denied.

Dated: Kew Gardens, New York
June 27, 1995

Stephen Antignani
Assistant District Attorney
(718) 286-5852

To: Tony Bennett
#84A6051
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM, PART L-5

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

MEMORANDUM OF LAW :

-against- :

TONY BENNETT, :

Defendant. :

----------x

POINT ONE

DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS FIRST TWO CLAIMS.

This Court cannot entertain defendant's claim that his conviction should be vacated because of the court's failure to allow Elias Mahamed to testify, since defendant has already raised this claim on his direct appeal. Nor can defendant successfully challenge that ruling by claiming that it was prompted by prosecutorial misconduct. The Appellate Division has already determined that the trial court's refusal to allow Mahamed to testify at defendant's trial, in light of the overwhelming evidence of defendant's guilt, amounted to

harmless error. People v. Bennett, 128 AD2d at 541.[4] Defendant cannot re-litigate this claim on a motion under C.P.L. § 440.10. Nor can he raise his collateral claim that the prosecutor urged the Court to make this ruling in bad faith.

Section 440.10(2)(a) of the Criminal Procedure Law mandates the denial of a defendant's motion when "the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue." Defendant has already adjudicated the precise issue that he raises here in his first claim, and does not even contend in his moving papers that there has been a retroactive change in the controlling law. Furthermore, defendant's second claim cannot possibly succeed in view of the Appellate Division's ruling on that issue because, even if the prosecutor did act in bad faith in asking for preclusion -- a fact that defendant has failed to establish -- that fact would only justify vacatur of defendant's conviction if it actually prejudiced defendant. Since the Appellate Division already concluded that the preclusion was harmless beyond a reasonable doubt, any claim in this motion that is based upon the preclusion of Mahamed's testimony must be summarily denied. See C.P.L. § 440.10(2)(a)

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[4] A copy of the Appellate Division's decision is attached as People's Exhibit B.

POINT TWO

DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS THIRD CLAIM AND, IN ANY EVENT, THAT CLAIM IS DEVOID OF MERIT.

Defendant's third contention, that he is entitled to have his conviction vacated because he was allegedly not present at his Sandoval hearing, is also procedurally barred. Pursuant to C.P.L. § 440.30(4)(c), this Court should deny defendant's motion to vacate judgment without a hearing because the allegation is conclusively refuted by documentary proof. The court papers reveal that on March 21, 1984, the date of the Sandoval hearing, defendant was present with his counsel, Charles Lavine. See Exhibit A. That evidence conclusively refutes defendant's claim that he was not present during this hearing. This claim is thus procedurally barred under C.P.L. § 440.30(4)(c).

Even if the evidence that defendant and his attorney were present at defendant's Sandoval hearing were not conclusive, a motion to vacate judgment is not a substitute for an appeal, and must be denied, if, although there are sufficient facts on the record to permit the appellate court to review the claims raised in the motion, the defendant unjustifiably failed to raise the issues on his direct appeal. C.P.L. § 440.10(2)(c); People v. Cooks, 67 N.Y.2d 100 (1986). On direct appeal, defendant raised six issues but failed to raise the on-the-record claim that he is now raising in his motion to vacate judgment. Therefore, because defendant could have raised this claim on direct appeal, but unjustifiably failed to do so, his claim is procedurally barred from review by this Court.

And, even if the record was not sufficient to permit review on direct appeal, defendant could have caused such facts to appear on the record. Therefore, if such is the case here, then defendant's claim is barred under C.P.L. § 440.10(3)(a). Finally, even if this is a purely off-the-record claim, it is still procedurally barred because defendant could have raised this issue in his original 440 motion, but unjustifiably failed to do so. See C.P.L. § 440.10(3)(c).[5]

In any event, even assuming arguendo that defendant was not present, his claim that his right to be present at his Sandoval hearing was violated pursuant to People v. Dokes, 79 N.Y.2d 656 (1992), is meritless. In People v. Favor, the Court of Appeals held that Dokes applied retroactively to those cases within the appellate process, and distinguishes between cases pending on direct appeal and convictions that have already become final. 82 N.Y.2d 254, 261 n.2, 267 (1993). Specifically, the Court held that, " for purposes of retroactivity analysis, our court has drawn a sharp distinction between cases on direct appeal and cases in which '[t]he normal appellate process [has come] to an end'. " Id. (citing People v. Pepper, 53 N.Y.2d 213, cert. denied, 454 U.S. 967 [1981]).

In this case, defendant's conviction was final on March 2, 1987, because it had been upheld by the Appellate Division. See People v. Pepper, 53 N.Y.2d at 222. Both Dokes and Favor were decided after March, 1987, and cannot, therefore, be applied to defendant's motion. As a result, defendant is precluded from invoking any purported Dokes rights in this

---

[5] Moreover, defendant's claim that he was not present at the Sandoval hearing is an assertion of fact unsupported by any other affidavit or evidence, and there is no reasonable possibility that it is true. Thus, the claim is also barred under C.P.L. § 440.30(4)(d).

collateral attack on his conviction. See People v. Favor, 82 N.Y.2d 254, supra; People v. Pepper, 53 N.Y.2d at 222.

Moreover, a defendant's absence from a Sandoval hearing does not warrant reversal if the outcome of the hearing was favorable to the defendant, thereby rendering his presence "wholly superfluous." People v. Smith, 82 N.Y.2d 254 (1993) (companion case to People v. Favor, 82 N.Y.2d 254, supra); People v. Dokes, 79 N.Y.2d at 662. Here, defendant's only prior conviction had been converted to a youthful offender adjudication, to which the Court precluded any reference. This ruling obviously did not have any chilling effect on defendant's decision to testify. In fact, defendant did choose to testify at trial. Moreover, the cross-examination of defendant contained no references to defendant's prior bad acts or crimes. The court's ruling was, therefore, favorable to defendant, and defendant's presence would not have been meaningful, as he would not have needed to provide any pertinent information about the details of his prior crime.

In short, defendant's claim that he was not present during the Sandoval hearing is meritless, belied by the record, and procedurally barred.

CONCLUSION

For the reasons set forth above, defendant's motion to vacate his judgment of conviction should be summarily denied.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

CHERYL HONE
STEPHEN ANTIGNANI
Assistant District Attorneys
of Counsel

June 27, 1995

STANDARDS & GOALS Sep 22, 1983 DEADLINES FOR THIS CASE ARE: TRIAL SENTENCING DEFENDANT PRESENT WITH COUNSEL (Augustus Agate) (Arr. Only) ARRAIGNED NOT GUILTY PLEA ENTERED ADJOURNED TO 5/10/83 FOR PRE TRIAL FELONY SCHEDULE BAIL CONDITIONS P/C	3/21/84 3/21/84 5-1-84 2/1/85	Sandoval Hearing held see Steno record Deft pres w/counsel C. Lavine ADA John Scarpa Rep Jack Gershon WILLIAM D. FRIEDMANN LS Deft. remanded for trial all parties as above WILLIAM D. FRIEDMANN, LS DEFT. PRES W/COUNSEL CHAR. LEVINE WHO IS RELIEVED. AUGUSTUS C. AGATE RETAINED. MOTION TO SET ASIDE VERDICT MADE ADJ. TO 6/5/84 REMAND. HON. W.D. FRIEDMANN REP H. RELLA ADA J. SCARPA Deft. appeared on

COURT REPORTER Sam Cioreiori JUDGE HON. RALPH SHERMAN APRIL 13 1983 18 B Atty Assigned DEC 16 1983 Deft pre w/atty Charles Levine ADA James Quinn CR E Kalish Wade held testimony taken cont'd 12-20-83 P/C HON. JOAN O'DWYER DEC 1983 Def pres w/atty Charles Levine ADA James Quinn CR E Kalish cont'd T/T BSRDR C-3-1-8-84 P/C HON. JOAN O'DWYER		motion to set aside sentence with attny Martin Landou. Ast DA John Scarpa. Court Reporter: Robert Horwitz. Motion w/d by defense attny. Granted by the court, Off calendar. Hon. WILLIAM D. FRIEDMANN L-5

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

____AD2d _____ Submitted - January 22, 1987

WILLIAM C. THOMPSON, J.P.
JAMES F. NIEHOFF
MOSES M. WEINSTEIN
GERALDINE T. EIBER, JJ.

2754 E

The People, etc., respondent
v. Tony Bennett, appellant.
(Ind. No. 842/83)

DECISION & ORDER

Donald E. Gilbert, New York, N.Y., for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Seymour Roth of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 25, 1984, convicting him of attempted murder in the first degree (two counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (two counts), criminal possession of stolen property in the first degree and unauthorized use of a motor vehicle, upon a jury verdict,

and imposing sentence.

ORDERED that the judgment is affirmed.

Upon the exercise of our factual review power we are satisfied that the evidence was of sufficient quantity and quality to establish the defendant's guilt beyond a reasonable doubt. The two police-officer victims separately identified the defendant in a lineup and such identifications by police officers, who are trained to carefully view and identity suspects, are entitled to great weight (see, People v. Morales, 37 NY2d 262).

Further, while the court erred in precluding the defendant from calling a defense witness, Mr. Mahamed, who would have testified that he had spoken with the defendant and his alibi witness approximately one hour after the commission of the crime, this error does not require a reversal. The defendnat had testified that he was at his friend's house at the time the crime was committed and had joined the crowd that appeared near the scene of the crime when shots were heard. His friend corroborated this account. The defendant further testified that he had spoken to Mr. Mahamed, his neighbor, near the scene and had inquired as to what was happening. As Mahamed's testimony would not have accounted for the defendant's whereabouts during the crime or placed him away from the crime scene shortly thereafter (see, People v. Cuevas, 67 AD2d 219), he was not an alibi witness (CPL 250.20). Thus, the defendant was not required to include his name in his notice of alibi and he should have been permitted to call him as a witness. However, in light of the overwhelming evidence of guilt, this testimony concerning the defendant's presence near the scene of the crime approximately one hour after its commission was harmless beyond a reasonable doubt (see, People v. Crimmins, 36 NY2d 230).

We have examined the defendant's remaining contentions and find them to be without merit.

THOMPSON, J.P., NIEHOFF, WEINSTEIN and EIBER, JJ., concur

ENTER:

Martin H. Brownstein
Clerk

March 2, 1987

AFFIDAVIT OF SERVICE
BY MAIL

State of New York)
)ss:
County of Queens)

SABRINA MARS, being duly sworn, deposes and states as follows:

1. I am over the age of 18 years and not a party to this action.

2. On June 29, 1995, I served the within **AFFIRMATION, MEMO OF LAW, & EXHIBITS** in the case of People v. **TONY BENNETT**, on the following defendant pro se:

Tony Bennett
84-A-6051
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

by causing one true and correct copy of the document to be placed in a post-paid wrapper and then deposited in the official depository maintained and controlled by the United States Postal Service located at 80-02 Kew Gardens Road, Kew Gardens, New York 11415.

SABRINA MARS

Sworn to before me this
29th day of June, 1995

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: Criminal Term Part L-5

The People of the State of New York, : PETITIONER'S REPLY

:

Respondent,

:

-against-

:

Tony Bennett,

:

Petitioner.

I Tony Bennett, am the petitioner herein and I am filing this Reply to the District Attorney's frivolous and criminal Affirmation in opposition to the defendant's Motion to Vacate Judgment.

1. That the district attorney is seeking relief from this court that would be a violation of the New York State Criminal Procedure Law and the United States Codes under Title 28 USC § 2254(b) and Title 2241-2254 of the United States Codes.

2. The District Attorney cites hypothesis and arguendo's on paper that the County and or State Agencies could use to off set the State budget crisis with. The District Attorney has wasted a lot of time and money for schooling that could have been better used other than arguing a matter that he most assuredly knows nothing about or how to argue the matter before the court. Under Jennison v. Goldsmith, 940 F.2d 1308; Washington v. James, 996 F.2d 1442; Though, the petition has

unexhausted and exhausted claims in it, the Supreme Court has to review both claims and render a decision on the merit of the record and not some frivolous record that is not a court transcript, the district attorney would have this court believe that exhibit A is some genuine court document that is no more a legal representation than a Wendy's hamburger, meat is meat and this alleged document with no indication of who wrote it, where it came from, half of the form is written and no authentication as to who wrote it, nothing more than notes that do not present facts that are signed by anyone. The court transcript refutes the belied representation by the responding district attorney and refutes any exhibit that the district attorney could produce, or forge as an exhibit. Therefore, the representation by the prosecutor of this alleged exhibit.

In point two of the Memorandum of law is now giving rise to an Effective Assistance of trial and appellate counsel coupled with the Sandoval issue and admitted by the prosecutor by claiming § 440.30(4)(c) of the CPL and the representation that the district attorney is trying to refute is only adding more issue's and merit to the petitioners claims. Also in point two of the same self styled Memorandum of law (Which is not required under Article 440.30) says that the Dokes case "assuming - arguendo" that the Dokes case was not retroactive, the district attorney would now assume the roll as legislature also in dictating to the court how the law must be applied, the district attorney is not an elected official, legislature or otherwise.

This court must stay within the perimeters of the State and Federal Statues and Constitution and based upon the trial transcript this court must grant the petitioner a hearing In Personam unless the district attorney can produce a transcript to refute the proof therein.

WHEREFORE the petitioner prays that this honorable court grant the relief herein under the New York State Criminal Procedure Law and for whatever relief this court deems just and equitable.

FURTHER, that the district attorney's opposition is without merit and Exhibit A and it's representation if fraudulent and worthless to this court to represent any facts thereof, Exhibit B proves ineffective assistance of both trial counsel and appellate counsel, Moreover, the district attorney has stated that the petitioners claims are barred by the Statue, the Criminal Procedure Law when it was reappealed in 1974 it was not the legislatures intent to limit collateral attack of a conviction, therefore, again the district attorney would like to play legislature, and in determining or applying the retroactivity or how it should be applied to cases. The petitioner maintains that the only issue that is "Superfluous" is the opposition of the district attorney as he is sending a message to the Court of Appeals and the reviewing Federal District Court and this court must not condone these actions by a court officer. Therefore, the opposition should be dismissed as frivolous and devoid of any merit.

TONY BENNETT Pro-se

Sworn to before me the 5th
day of July, 1995

Paul W. Sargent
Notary Public

TO: District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, N.Y. 11415

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF QUEENS:
CRIMINAL TERM: PART L-5

----------x

THE PEOPLE OF THE STATE OF NEW YORK,	:	INDICTMENT # 842-83
-against-	:	
TONY BENNETT,	:	
Defendant.	:	CAL. CALL

----------x

25-10 Court Square
Long Island City, NY
November 30, 1995

B E F O R E :

HON. TIMOTHY FLAHERTY, J.S.C.

A P P E A R A N C E S :

HON. RICHARD A. BROWN, ESQ.
District Attorney, Queens County
BY: ROBERT VALLI, ESQ.

KAREN L. FLAHERTY
Senior Court Reporter

COURT CLERK: Recall on number one, 842 of '83, Tony Bennett.

MR. VALLI: Robert Valli for the People.

I had spoken to your law secretary by phone and conferred we would rely on the decision or response that we had previously made. I think he informed me the Court would make a decision based on that response.

THE COURT: Yes. The motion is denied.

* * *

THE FOREGOING IS A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS.

_____

KAREN FLAHERTY
Official Court Reporter

(2)

No. 99-1238

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

TONY BRUCE BENNETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

RICHARD A. BROWN
District Attorney, Queens County

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for the Petitioner

June 22, 2000

66pp

QUESTION PRESENTED

Is a state post-conviction application "properly filed" within the meaning of 28 U.S.C. section 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions, if it is procedurally barred from review under state law?

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People v. Bennett, 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987) 3

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People v. Odiat, 82 N.Y.2d 872,
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People v. Orr, 240 A.D.2d 213, 659 N.Y.S.2d 1
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Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 11

Sloan v. Delo, 54 F.3d 1371 (8th Cir. 1995),
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Smith v. McGinniss, 208 F. 3d 13 (2d Cir. 2000) 33

Smith v. Robbins, __ U.S. __,
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Smith v. Ward, 209 F.3d 383 (5th Cir. 2000) 30 n.5, 40

Spalding v. Aiken, 460 U.S. 1093 (1983) 11

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Taylor v. Williams, __ U.S. __,
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Texas and Pacific R. Co. v. Abilene Cotton Oil Co.,
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United States v. Bacto-Unidisk, 394 U.S. 784
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141 Cong. Rec. S7820 (1995) 18

141 Cong. Rec S7822 (1995) 12, 18

141 Cong. Rec. S7823 (1995) 12, 17

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Other Authorities

Victor Flango & Patricia McKenna,
Federal Habeas Corpus Review of
State Court Convictions, 31 Cal.
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James Liebman & Randy Hertz, Federal Habeas Corpus
Practice and Procedure
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Mark Tushnet & Larry Yakle, Symbolic Statutes
and Real Laws, 47 Duke L. J. 1, 29
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Merriam Webster Collegiate Dictionary 935
(10th ed. 1995) 29

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 199 F.3d 116, and reprinted in the Appendix to the Petition for a Writ of Certiorari at 4a. The unpublished opinion and order of the United States District Court for the Eastern District of New York is also reprinted in that Appendix at 1a. The certificate of the New York Court of Appeals denying leave to appeal is reported at 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987). The decision of the New York State Appellate Division of the Supreme Court affirming the judgment of conviction is reported at 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1999. The petition for a writ of certiorari was filed within 90 days of that date, on January 24, 2000, and is therefore timely. Sup. Ct. R. 13. The jurisdiction of this Court rests on 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d)(2) of Title 28 of the United States Code provides:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 440.10(2) of the New York Criminal Procedure Law is reprinted in the Petition for a Writ of Certiorari at 3-4.

STATEMENT OF THE CASE

On March 28, 1984, respondent Tony Bruce Bennett was found guilty in New York State Supreme Court of two counts of Attempted Murder in the First Degree and other crimes for firing a handgun at pursuing police officers during a high-speed chase. During the next fourteen years, he made a series of unsuccessful attempts to overturn his conviction, culminating in the habeas corpus petition in this case.

First, prior to sentence, Bennett moved to set aside the verdict, pursuant to New York Criminal Procedure Law section 330.30, on the basis of newly discovered evidence and on the ground that the trial court had committed reversible error in precluding a defense witness. That motion was denied in a lengthy written decision on December 1, 1984 (JA 79-93).[1]

Second, Bennett filed a direct appeal alleging six claims of error, including the claim that the trial court had committed reversible error in precluding a defense witness (JA 11-41). Bennett's conviction was unanimously affirmed by the New York State Appellate Division, Second Department, on March 2, 1987. *People v. Bennett*, 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987). With regard to defendant's witness preclusion claim, the court held that the trial court had erred under state

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[1]After the motion to set aside the verdict was denied, Bennett was sentenced to fifteen years to life on the attempted murder counts and to lesser concurrent sentences on the remaining counts. Bennett was later tried and convicted under Indictment Number 757/85 of Robbery in the First Degree, Assault in the First Degree, and lesser charges. He was sentenced to a term of twelve and one-half to twenty-five years on the first-degree robbery count and lesser concurrent sentences on the remaining counts, all of which were to be served consecutively to his sentence in this case. *People v. Bennett*, 144 A.D.2d 564, 534 N.Y.S.2d 422 (2d Dept. 1988), *leave to appeal denied*, 73 N.Y.2d 889, 538 N.Y.S.2d 801 (1989). He is currently incarcerated pursuant to these sentences.

law, but that the error was harmless beyond a reasonable doubt. It found Bennett's remaining contentions to be without merit. Leave to appeal to the New York Court of Appeals, the State's highest court, was denied on May 7, 1987. *People v. Bennett*, 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987). Bennett did not file a petition for a writ of certiorari in this Court.

Third, on May 28, 1991, four years after the New York Court of Appeals denied leave to appeal, Bennett filed a collateral motion to vacate his conviction pursuant to New York Criminal Procedure Law section 440.10 (JA 104). Bennett argued that newly discovered evidence warranted a new trial, that the prosecutor had made improper comments in summation during his trial seven years earlier, and that all of his prior attorneys were ineffective (JA 104).

The trial judge denied the motion on August 2, 1991 (JA 97). The court held, *inter alia*, that the summation error claim was procedurally barred under New York law, which precludes review of a claim that could have been raised on direct appeal but was not (JA 107). *See* N. Y. Crim. Proc. Law §440.10(2)(c). The Appellate Division denied leave to appeal on September 30, 1991.

Fourth, in 1995, Bennett filed another collateral motion to vacate his conviction under section 440.10 (JA 112-21). This application contained three claims: first, that the trial court had committed reversible error in precluding the defense witness, a claim Bennett had made on direct appeal (JA 114-19); second, that the prosecutor had committed misconduct by urging the court to preclude the defense witness (JA 119); and third, that he had been denied his right to be present at a pre-trial proceeding held pursuant to *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974), to determine which prior crimes the prosecutor could use to impeach him (JA 119-21).

The prosecution responded, *inter alia*, that all three of Bennett's claims were subject to a mandatory procedural bar. As the prosecutor explained, under the procedural bars contained in section 440.10(2), a court cannot hear the merits of a claim that was previously raised on appeal and decided adversely to the defendant or a claim that could have been raised on direct appeal but was not. Because Bennett's claims were either raised on direct appeal or could have been, the court could not consider the merits (JA 126-31).

In an oral decision on the record on November 30, 1995, the trial court denied the motion without elaboration (JA 142-43). Bennett later wrote letters to the court seeking a copy of the written decision, without which Bennett could not seek leave to appeal. Bennett never received that written decision.

On February 11, 1998, nearly fourteen years after he was found guilty in state court and almost eleven years after the conclusion of direct review, Bennett filed a federal habeas corpus petition in the Eastern District of New York. *See* Petition, No. 98-CV-1274 (E.D.N.Y.). In it, Bennett raised three grounds for issuance of the writ. In Ground One of the petition, he again raised the witness preclusion claim, a claim that he had first raised in state court almost fourteen years earlier in his motion to set aside the verdict. In Ground Two, Bennett argued that he was denied his right to be present at the *Sandoval* proceeding. In Ground Three, Bennett argued that counsel was ineffective for failing to object to the prosecutor's allegedly improper summation comments. Bennett then argued that trial counsel was ineffective "under the facts presented" in all three grounds.

The District Court summarily dismissed the petition as time-barred under the one-year statute of limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996. *Tony Bennett v. Christopher Artuz*, No. 98-CV-1274 (E.D.N.Y.

February 25, 1998)(Cert. Pet. App. at 1a). The court held that, under the Second Circuit's decision in *Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997), Bennett, whose conviction had become final before the enactment of AEDPA, had a grace period consisting of a "reasonable time" after the effective date of AEDPA to file his petition. He had exceeded that reasonable time by failing to file the petition until one year and nine and one-half months after the Act's effective date. The court noted that the petition did not set forth any reason for the delay.

The Second Circuit granted a certificate of appealability. In that court, Bennett argued that AEDPA's statute of limitations had never begun to run in his case (Brief of Appellant at 6-11). He noted that under 28 U.S.C. section 2244(d)(1)(B), the limitations period commences on the latest of four dates, one of which is the date on which an impediment to filing is removed. He argued that the state courts had prevented him from filing his petition by refusing to give him a written copy of the decision on his 1995 motion, which was required in order to seek leave to appeal from the order denying the motion.

The Second Circuit decided the case on a different ground. *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999). The Second Circuit held that the tolling provision of section 2244(d)(2) for "properly filed" state court post-judgment proceedings applied to Bennett's case and tolled all of the time from the enactment of AEDPA to the filing of the petition. In so doing, the court made three rulings, all of which were necessary to an outcome favorable to Bennett. The court first decided that the tolling provision applied to the one-year grace period that it had given to state prisoners to file their petitions under *Ross v. Artuz*, 150 F.3d 97, 99 (2d Cir. 1998), which was decided after the district court decision. *Id.* at 118-19. The court then concluded that the 1995 motion was still "pending" through the time Bennett had filed the habeas petition because the state had never provided Bennett with a copy of the written

decision allowing him to appeal and thus state court review of the motion had not been completed. *Id.* at 119-21.

Finally, the court held that Bennett's 1995 motion was "properly filed" within the meaning of the tolling provision. The court noted the split of authority over the meaning of the term and noted that neither AEDPA nor its legislative history explained which state filings qualify as "properly filed" applications. *Id.* at 121. The Second Circuit then held that the tolling provision encompasses any "application for state post-conviction relief recognized as such under governing state procedures." *Id.* at 123. The court applied this language to Bennett's 1995 motion, tolling the statute of limitations for the motion, even though the motion was mandatorily procedurally barred under state law.

This Court then granted certiorari on the question of whether the Second Circuit erred in applying the tolling provision to a state court application that was procedurally barred and could not be heard on the merits. ***Artuz v. Bennett***, __ U.S. __, 120 S. Ct. 1669 (2000).

SUMMARY OF ARGUMENT

In enacting the Anti-Terrorism and Effective Death Penalty Act of 1996, Congress effected sweeping changes in the handling of federal habeas corpus petitions in order to curb the abuse of the writ and address the acute problems of unnecessary delay. A key provision of that legislation was the new one-year statute of limitations imposed on state prisoners who, Congress found, routinely seek redress in federal court far too long after their convictions become final in state court. 28 U.S.C. §2244(d).

While seeking to limit delays, Congress provided a tolling provision in the statute, designed to allow state prisoners

to exhaust state remedies before coming to federal court. In interpreting that tolling provision, which suspends the statute of limitations during the pendency of "properly filed" state post-conviction applications, however, the Second Circuit permitted tolling for every "post-conviction application recognized as such" by state courts, including those subject to mandatory state procedural bars. *Bennett*, 199 F.3d at 123. The Second Circuit thereby interpreted the statute to tolerate entirely needless delays that undermine the purpose and operation of the limitations period while doing nothing to advance the objective of the tolling provision.

The Second Circuit interprets the tolling provision to include entirely repetitive post-conviction applications that are barred under state rules, regardless of whether the application is the prisoner's first or fiftieth. The delays caused by these motions can accumulate rapidly from months to years, during which time no useful end is achieved. Moreover, this interpretation affords state prisoners, against whom the limitations period was designed to run, the power to extend the period of limitations at will simply by filing repetitive, procedurally barred motions in state court. This result is especially troublesome as applied to capital prisoners, whose delays were of particular concern to Congress, because those petitioners have an exceptionally compelling incentive to delay.

The Second Circuit's formulation also extends the provision far beyond its purpose, because state post-conviction applications that are mandatorily barred under state law cannot advance the purposes of exhaustion. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Teague v. Lane*, 489 U.S. 288, 297-98 (1989) (plurality opinion). Still worse, the interpretation fails to show adequate respect for state court procedural rules, as required by principles of federalism central to this Court's habeas corpus jurisprudence. *See Coleman v. Thompson*, 501 U.S. 722, 726 (1991). It instead ignores the

vast majority of those rules and affords a benefit, in the form of tolling, to prisoners who do the same.

By contrast, an interpretation that denies tolling for state court applications that are mandatorily procedurally barred prevents prisoners from benefitting from repetitive litigation, precludes prisoners in capital cases from causing the same delays that they could have before the statute, and excludes from the tolling provision only state applications that could not have served the purposes of exhaustion. It also accords state procedural rules their due respect, as federalism requires.

The objections to an interpretation that denies tolling for procedurally barred state applications are essentially that it over-involves the federal courts in state procedural issues that state courts are better equipped to handle, that it "engrafts" a "merits requirement" onto the statute, that it is overly harsh on petitioners who may not understand state procedures, and that the delays that would be tolerated under a contrary interpretation are insignificant and readily controlled by other means. These claims are unavailing.

First, the federal courts already decide whether a claim is procedurally barred under state law when determining whether a remedy is "available" under the exhaustion doctrine, and the courts' prior decisions on these issues can provide guidance in applying the tolling provision. Second, the "merits inquiry" required is simply an application of the states' procedural rules, and involves no more of an examination of the true merits than would be currently performed in interpreting those rules under the exhaustion doctrine. Nor does an interpretation of the vague term "properly" that gives effect to state procedural rules "engraft" anything onto the statute that Congress did not intend. Third, petitioners are already required to be familiar with state procedural rules under current habeas practice. Moreover, the problem of a prisoner who believes that

he has reasonably invoked an exception to the procedural rule can be addressed by resolving such true ambiguities in favor of the prisoner and allowing tolling, just as a court considering whether a claim is procedurally barred under state law for exhaustion purposes would resolve such ambiguities in favor of exhaustion. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989) (presumption in favor of exhaustion).

Fourth, the delays caused by repetitious state prisoner litigation are truly significant, and capital prisoners are particularly likely to take advantage of every possible opportunity to delay that is afforded to them. Moreover, the proposed alternatives that, it is argued, could be enacted by the states to limit delay contravene fundamental principles of federalism that require the federal courts to avoid imposing a single solution "from the top down" on a difficult question of policy, such as how to control repetitive prisoner litigation. *See Smith v. Robbins*, __ U.S. __, 120 S. Ct. 746, 758 (2000).

Applying, then, the correct interpretation of the statute, Bennett's last state-court motion did not toll the limitations period because it was mandatorily barred under state law. The Second Circuit thus erred in excluding the period of time during which that motion was pending from the limitations period, and the judgment below should be reversed.

ARGUMENT

THE SECOND CIRCUIT ERRED IN HOLDING THAT BENNETT'S STATE POST-JUDGMENT APPLICATION, WHICH WAS PROCEDURALLY BARRED UNDER NEW YORK LAW, WAS "PROPERLY FILED" AND THEREFORE SUFFICIENT TO TOLL AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS.

In holding that AEDPA's one-year statute of limitations is tolled for every "application for post-conviction relief recognized as such," the Second Circuit allowed tolling for motions, like respondent Bennett's, that are subject to a mandatory procedural bar under state law and cannot be heard on the merits. This interpretation allows state prisoners to benefit from repetitious, needless applications in a manner that serves neither the objective of curbing delays nor the aims of the exhaustion doctrine. The interpretation also provides a tool for dilatory prisoners, particularly prisoners in capital cases, to extend the statute, and it shows disrespect for, and affirmatively undermines, state procedural rules that attempt to control state post-conviction litigation. Congress could not have intended such results.

All of the defects in the Second Circuit's interpretation stem from the court's failure to understand and appreciate the need Congress perceived to halt state prisoners' unnecessary delays in coming to federal court, the function of the tolling provision in the statutory scheme, and the need to balance the aims of each.

Congress enacted its one-year statute of limitations for state prisoners seeking habeas relief to address "acute problems of unnecessary delay" in habeas review. *See* H.R. Conf. Rep. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944. As Congress recognized, and this Court has observed in

the past, the detrimental effects of delays take many forms. Delays in a definitive adjudication of guilt undermine the finality of state court judgments of conviction by keeping them perpetually subject to attack in federal court and therefore forever tentative in their conclusions. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Neither innocence nor just punishment can be vindicated until the final judgment is known"); *Mackey v. United States*, 401 U.S. 667, 690 (1971) (all parties have an interest in "insuring that there will at some point be the certainty that comes with an end to litigation . . . .") (Harlan, J., concurring). Delays also impair the state's legitimate interest in deterring crime, inasmuch as the deterrent force of penal laws is weakened by the realization that any punishment that is imposed may be overturned at any time. *See Engle v. Isaac*, 456 U.S. 107, 127-28 n. 32 (1982). So too the state's interest in rehabilitating a suspect is undermined because "rehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation.'" *Id.* at 128 (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 [1963]); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring). And, as this Court has observed, "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *McCleskey*, 499 U.S. at 492; *see also Spalding v. Aiken*, 460 U.S. 1093, 1096-97 (1983) (Burger, C.J., concurring); 141 Cong. Rec. S7807 (1995) (Sen. Hatch).

Lengthy delays also impair the ability of the state to conduct retrials due to the "erosion of memory" and "dispersion of witnesses" that occur with the passage of time, and delays thereby diminish the chances of a reliable adjudication of guilt. *See McCleskey*, 499 U.S. at 491; *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (plurality opinion). Morever, delays extend the ordeal of the victims and victims' families who, must endure the possibility that the offender will go free, no matter how much

time has passed since the trial or appeal in state court. 141 Cong. Rec. S7804 (1995) (Sen. Hatch); 141 Cong. Rec. S7807 (1995) (Sen. Hatch); 141 Cong. Rec. S7823 (1995) (Sen. Abraham).

Congress also recognized that the effects of delay are particularly pernicious in capital cases, where a state prisoner can and frequently does frustrate "the States' sovereign power to punish offenders." *Engle v. Isaac*, 456 U.S. at 128; *see* 141 Cong. Rec. S7823 (1995) (Sen. Abraham). Congressional supporters of the bill thus sought to end the "de facto nullification of capital punishment laws" by defendants who "have fully exploited the system's potential for obstruction." 141 Cong. Rec. S7822 (1995) (Sen. Nickles).

Disturbed by these effects of delay, Congress sought to forcefully address them by imposing a one-year limitations period on all petitions.[2] Under the provision, a prisoner in custody pursuant to a state judgment of conviction has one year to file a habeas corpus petition from the latest of four dates: the date on which direct appellate review of the judgment was completed, the date on which a state-created impediment to filing is lifted, the date on which a retroactively effective change in constitutional law is recognized, or the date on which the facts underlying the claim were known or could have been known with due diligence. 28 U.S.C. §2244(d)(1).

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[2]Congress enacted a separate, shorter statute of limitations to apply in capital cases if a state establishes a mechanism for the appointment of counsel for post-conviction review as well as for direct appellate review. 28 U.S.C. §§2261, 2263. No state has yet effectively "opted-in" to these provisions. When capital cases are not governed by the opt-in provisions, the one-year statute of limitations applies to them. *See* §2244(d) (one-year statute of limitations applies generally to any "application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court"); 2 James Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure §5.1b at 228 (3d ed. 1998).

In imposing this limitations period, however, Congress also recognized the necessity of allowing for the exhaustion of state remedies. *See* 28 U.S.C. §2254(b); H.R. Conf. Rep. No. 104-15 at 111, 1996 U.S.C.C.A.N. at 944. The exhaustion doctrine is designed to "minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). The doctrine advances the interests of comity, recognizing that state judiciaries are equally bound to uphold the federal constitution. *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Ex Parte Royall*, 117 U.S. 241, 251 (1886). It also promotes state courts' familiarity with federal constitutional issues, and it helps ensure that federal claims are accompanied by a complete factual record, including factual findings that may then be entitled to a presumption of correctness in federal court. *Rose v. Lundy*, 455 U.S. at 519.

Because the exhaustion of state court remedies can often be a time-consuming process, there is tension between the goals of ensuring full exhaustion and reducing delays: the more extensive the state court filings, the greater the delays in achieving finality. *See* Mark Tushnet & Larry Yakle, Symbolic Statutes and Real Laws, 47 Duke L. J. 1, 29 (1997). Congress sought to balance these competing concerns. *See* H.R. Rep. No. 104-23 (1995) (Judiciary Committee) (the statute of limitations provisions are designed to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner").[3] The legislation allows for exhaustion of

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[3]This report of the House Judiciary Committee accompanied H.R. 729, an immediate precursor of AEDPA in the same Congress. That bill contained the identical statute of limitations enacted under AEDPA for state prisoners in non-capital cases seeking section 2254 relief.

state remedies in two ways: by commencing the limitations period, at the earliest, after the direct appellate review process is over, *see* §2244(d)(1)(A), and by enacting a tolling provision for "properly filed" state post-conviction applications seeking review of the conviction, *see* §2244(d)(2); *Mills v. Norris*, 187 F.3d 881, 883-84 (8th Cir. 1999); Tushnet & Yakle, *supra*, at 30. While the former provision has engendered little debate, the latter has been the subject of much litigation and has resulted in widely varying interpretations among the circuit courts. Unfortunately, as several of the lower courts have noted, Congress provided little guidance on the meaning of "properly filed": the statute nowhere defines the term and the legislative history fails to articulate what Congress may have meant by this language. *See* H.R. Conf. Rep. 104-518; *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999); *Hughes v. Irvin*, 967 F.Supp 775, 778 (E.D.N.Y. 1997). Congress thus left to this Court the task of defining the term.

In construing "properly filed," the Court should look to the purposes of the statute of limitations and the tolling provision and attempt to arrive at "an interpretation that achieves some rough peace between section 2244(d) and the exhaustion requirement." Tushnet & Yakle, *supra*, at 30. This approach is consistent with both this Court's prior habeas jurisprudence and with well-established principles of statutory construction. This Court has in the past resolved disputes concerning the meaning of Congress's habeas legislation by considering the purposes sought to be achieved. *See Rose v. Lundy*, 455 U.S. at 510 (holding that mixed petitions must be dismissed "[b]ecause a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute . . . ."). And time-honored principles of statutory interpretation counsel the same inquiry. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *United States*

v. Bacto-Unidisk, 394 U.S. 784, 799 (1969) ("where the statute's language seems insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose'").

The Second Circuit's interpretation, however, fails to take into account the competing considerations underlying the statute of limitations and the tolling provision and certainly fails to achieve any "rough peace" between them.

A. The Second Circuit's Interpretation of "Properly Filed" Eviscerates the Statute of Limitations by Allowing State Prisoners to Extend the Limitations Period Indefinitely; It also Extends the Tolling Provision Far Beyond Its Purpose and Significantly Undermines State Procedural Rules.

The Second Circuit held that the tolling provision suspends the limitations period whenever a prisoner files any application for post-conviction review "recognized as such" by the state courts, whether or not the prisoner has made any effort to comply with state procedural rules and regardless of whether the state court could possibly hear the merits of the claim. In fact, this interpretation would appear to include virtually any application that a state court clerk could discern was directed at a particular judgment of conviction. This formulation is dangerously inadequate because it allows for unnecessary and harmful delays, goes far beyond the purpose of the tolling provision, and seriously undermines state procedural rules.

First, the Second Circuit's interpretation would allow state prisoners to obtain the benefit of tolling for entirely repetitive, procedurally barred applications in state court that serve no purpose other than delay. Petitioners routinely file such motions in state court, sometimes to the point of absurdity, and these applications engender years, if not decades, of delay in a very significant number of cases. *See* Victor Flango & Patricia McKenna, Federal Habeas Corpus Review of State

Court Convictions, 31 Cal. W. L. Rev. 237, 245 (1995) (fifty percent of state collateral attacks studied were brought by prisoners filing their third or subsequent petition); *see also, e.g., In re Sindram*, 498 U.S. 177 (1991) (petitioner who received speeding ticket challenged conviction in 27 motions in state and federal court and filed 43 separate petitions and motions in this Court); *In re McDonald*, 489 U.S. 180 (1989) (state prisoner sought relief from conviction by filing 73 applications over 18 years). The Second Circuit's interpretation, however, would afford tolling for these repetitive, procedurally barred state applications regardless of whether the application was the prisoner's first or fiftieth and regardless of the number of procedural rules the prisoner had violated. *See Hughes v. Irvin*, 967 F.Supp. at 777-79 (affording tolling for petitioner's seventh motion to vacate judgment in the trial court).

Still more disturbing is that by filing such motions, a state prisoner could extend the statute of limitations at will. The state prisoner could, in fact, indefinitely enlarge the limitations period by the simple expedient of filing motion after motion, even if all of his claims have already been raised and decided adversely to him. This prospect is particularly alarming as applied to capital defendants, who have a powerful interest in delay. There can indeed be no question that capital defendants have a truly compelling incentive to postpone the imposition of the death penalty and to use every possible tool to do so. Yet, under the Second Circuit's interpretation, a capital defendant need only re-file an old, already procedurally barred motion in order to generate delay. Such automatic delays in capital cases "frustrate . . . the States' sovereign power to punish offenders," *Engle v. Isaac*, 456 U.S. at 128, by preventing the state from carrying out the sentences imposed pursuant to presumptively valid state court judgments of conviction. Still worse, they do so even when the state procedure that has been invoked does nothing to advance any claim, whether meritorious or not, that the defendant may have.

Congress could not have intended to tolerate such delays or to effectively eviscerate the limitations period, particularly as applied to capital defendants. Extending the limitations period for so long, and perhaps even indefinitely, is directly contrary to the general purpose that underlies all statutes of limitations. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (rejecting interpretation of statute of limitations that "lengthen[ed] the limitations period dramatically" such that it was "longer than Congress could have contemplated" because the lengthy additional delay "conflicts with a basic objective . . . that underlies limitations periods"). Moreover, it would not be logical to assume that Congress, in enacting any statute of limitations, would place in the hands of the party against whom the limitations period is to run the power to extend the statute indefinitely. If a statute of limitations is to have any purpose or effect at all, the invocation of the tolling provision cannot be at will; it must be limited in some meaningful way. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) ("It is an elementary rule of construction that 'the act cannot be held to destroy itself'") (quoting *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

More important, as to AEDPA's statute of limitations specifically, the legislation's sponsors and supporters could not have made clearer that it was precisely such needless and frequently manipulative delays that Congress sought to control. Indeed, Senator Dole, one of AEDPA's primary sponsors, introduced the bill on the floor of the Senate by stating that it would prevent habeas petitioners from "gaming the system – with more delays, more unnecessary appeals, and more grief for the victims of crime and their families." 141 Cong. Rec. S5841 (1995). And Congress made particularly clear with regard to capital prisoners that it sought to end the process by which "criminals are able to delay the imposition of capital sentences indefinitely." 141 Cong. Rec. S7823 (1995) (Sen. Nickles). It cited what it believed were shocking delays in executions,

particularly delays due to repetitive litigation, *see, e.g.*, 141 Cong. Rec. S7804 (1995) (Sen. Hatch); 141 Cong. Rec. S7820 (1995) (Sen. Nickles), and expressed its feeling that such delays "exploited the system's potential for obstruction" and constituted "a de facto nullification of capital punishment laws." 141 Cong. Rec. S7822 (1995) (Sen. Nickles). Yet, under the Second Circuit's interpretation of the tolling provision, no change would occur for these capital prisoners, who would have the means to delay just as long as they could have previously.

Second, the Second Circuit's interpretation extends the scope of the tolling provision far beyond its purpose of allowing the exhaustion of state remedies. The exhaustion doctrine precludes federal review of a claim not presented to the state courts because it would be inappropriate "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950). While exhaustion thus requires that the state courts be given an opportunity to address the claim if desired, it does not require presenting a claim to state courts when the claim is mandatorily barred under state procedural rules. To the contrary, this Court has repeatedly held that the exhaustion doctrine does not require giving a state court an opportunity to consider a claim that is procedurally barred in state court. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999). Similarly, this Court has held on many occasions that exhaustion does not require repetitious litigation. *See, e.g., Roberts v. LaVallee*, 389 U.S. 40, 42 (1967); *Brown v. Allen*, 344 U.S. 443, 487 (1953). Yet the Second Circuit's interpretation would, in the supposed furtherance of exhaustion, allow tolling for a virtually infinite variety of post-conviction applications that do nothing to advance exhaustion, even when those applications are

repetitious and designed to cause delay and even though the state has imposed a strict rule barring such litigation tactics.

Nor does the Second Circuit's interpretation foster the principles underlying the exhaustion doctrine. Comity, and the need to avoid friction with state courts, does not require giving state courts an opportunity they do not wish to have. Indeed, friction with state courts will much more likely result from the Second Circuit's interpretation than from a contrary one because the Second Circuit's view encourages repetitious, procedurally barred state applications that waste the resources of the state courts and cause delays that the state has sought to avoid. Furthermore, a state court that cannot hear the merits of a claim will not become more familiar with federal constitutional law; it will simply repeat its own state procedural law. Similarly, a state court that will clearly find an issue procedurally barred will not conduct a hearing on the federal claim, and thus the federal claim will not be accompanied by a more complete record. Thus, exhaustion in no way requires the type of limitless tolling permitted by the Second Circuit.

Moreover, a defendant has no independent federal right to file state post-conviction motions, particularly ones that are procedurally barred under state law. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). State procedures, like federal procedures, that are "adopted to facilitate the orderly consideration and disposition of [post-conviction] petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error." *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983). Thus, Congress did not have any constitutional restraint requiring it to allow tolling for state proceedings that the state did not wish to provide.

Third, the Second Circuit's interpretation draws the line between unnecessary delays and exhaustion at a place that has

no substantive significance in any habeas doctrine and that, thus, provides no logical rationale for distinguishing between petitioners who deserve to be denied the benefits of the tolling provision and those who do not. Under the Second Circuit's interpretation, a state clerk's recognition of the prisoner's document as a post-conviction application and his or her decision to treat it as such will likely determine a petitioner's access to federal court. A prisoner's unfortunate labeling of a document or a poor turn of phrase in the application may cause the prisoner to be denied the benefit of tolling while a form application re-filed with the court for the tenth time will result in the full suspension of the limitations period. These differences cannot be justified. Similarly, because the Second Circuit's interpretation requires compliance with rudimentary filing procedures only, such matters as the number of copies filed and presence or absence of a notary stamp may be dispositive of a prisoner's access to federal court, as may the clerk's decision to overlook the technical requirements in a given case. These distinctions between worthy and unworthy applications are arbitrary and capricious at best.

Fourth, the Second Circuit's interpretation directly undermines state procedures that are entitled to deference and respect under principles of federalism that are at the very core of this Court's habeas corpus jurisprudence. Indeed, federalism is a central pillar upon which this Court's habeas decisions rest, *see, e.g., Coleman*, 501 U.S. at 726; *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977), and respect for, and deference to, state court determinations is undoubtedly at the heart of the reforms Congress intended to effect in enacting AEDPA. And, as this Court has made clear on many occasions, federalism requires that federal courts refrain from undermining state procedural rules that are designed to limit state litigation and channel limited judicial resources toward more meritorious claims. *See, e.g., Coleman*, 501 U.S. at 726; *Engle*, 456 U.S. at 129 (federal courts should avoid "undercutting the State's ability to enforce

its procedural rules."); *Wainwright*, 433 U.S. at 88-91 (state rule deserves respect because it is "employed by a coordinate jurisdiction within the federal system" and because it serves important state interests in requiring early resolution of federal claims).

But the Second Circuit's interpretation ignores the states' procedural mechanisms and indeed encourages state prisoners to ignore them as well to avoid the preclusive effect of the statute of limitations. It plainly gives prisoners, particularly capital ones, an additional incentive to abuse the states' processes. As a result, the states' carefully considered procedural mechanisms, which are barely capable of containing unnecessary post-conviction litigation as it is, are subject to further abuse as state prisoners file unreviewable, purposeless motions in an effort to delay anticipated federal proceedings. While nothing in the traditions of habeas corpus requires it, this interpretation forces state courts to "'tolerate needless piecemeal litigation, [and] to entertain collateral proceedings whose only purpose is to vex, harass, or delay.'" *Rose v. Lundy*, 455 U.S. at 521 (quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963)). Thus, under the Second Circuit's interpretation, the states not only lose the benefit of the statute of limitations in many cases, they must also suffer the frustration of having their efforts at controlling needless post-conviction litigation ignored and thereby subverted. And the states must then suffer the added injury of spending the extra resources necessary to deal with the additional post-conviction litigation spawned by the rule.

In the end, it can hardly be maintained that Congress, in enacting the tolling provision, intended to create a rule that undermines its own efforts at curbing delays, extends tolling to repetitious litigation that does not serve any conceivable purpose of exhaustion, effects virtually no change for capital prisoners, and undermines state efforts at curbing post-

conviction litigation. The Court then should look for a more rational meaning to the terms at issue, one that is more consistent with the purposes of the statutory provisions and that does not lead to consequences that Congress did not intend and would not condone.

B. An Interpretation that Denies Tolling for Post-Conviction Applications that Are Procedurally Barred Under State Law Curbs Unnecessary Delays, Amply Allows for Exhaustion of State Remedies, and Shows Respect for State Procedural Rules in a Manner that Promotes Principles of Comity and Federalism.

The dramatic deficiencies in the Second Circuit's interpretation of "properly filed" may be rectified with relative ease. Tolling only for post-conviction applications that a state court can hear on the merits under state procedural rules substantially limits delays in reaching federal court, eliminates from tolling only applications that could not serve the purposes of exhaustion in any event, and gives full effect to state procedural rules, as federalism requires.

First, an interpretation that tolls only for applications that can be heard on the merits does not suspend the limitations period for mandatorily barred petitions, and thus eliminates the delays that would otherwise rapidly accumulate during vexatious, dilatory post-conviction litigation. Curbing these substantial periods of delay, which would go entirely unchecked under the Second Circuit's interpretation, would substantially shorten the time it takes to get to federal court. Moreover, unlike the Second Circuit's interpretation, this interpretation does not place in the hands of state prisoners, particularly capital prisoners, the power to extend the limitations period at will by simply filing repetitive motions. State courts can use their procedural rules to control such applications, and capital prisoners will gain no benefit from ignoring the states' rules.

Second, denying the benefit of tolling only for applications that cannot be heard on the merits eliminates from the scope of the provision only applications that cannot serve the purposes of exhaustion. If an application is mandatorily procedurally barred under state law, it is "unavailable" and therefore unnecessary to exhaust the prisoner's state remedies. *See Gray v. Netherland*, 518 U.S. at 161; *Teague*, 489 U.S. at 297-98. Such a rule also fully respects the principles underlying the exhaustion requirement, because it allows state courts an opportunity to hear the merits of the claim unless they have already indicated through their procedural rules and decisions that they do not desire that opportunity. And only claims that the courts will hear on the merits can help familiarize the state courts with federal constitutional principles and will result in factual findings that will be helpful to the federal courts in resolving the federal constitutional issue.

Third, an interpretation that tolls the statute only for motions that can be heard on the merits links the tolling provision to its purpose, exhaustion, and thereby draws the line between applications that are worthy of its benefits and those that are unworthy at a logical and appropriate place. Applications that are mandatorily procedurally barred under state law and thus clearly do not advance the purposes of exhaustion do not get the benefit of the tolling provision, while those that do advance the purposes of exhaustion do get its benefits. And this line of demarcation not only advances the purposes of exhaustion while eliminating unnecessary delays, it promotes uniformity in habeas law and practice. It places the new tolling provision in the larger context of this Court's habeas corpus jurisprudence and allows courts to draw on established doctrines and prior cases to give meaning to it.

Fourth, an interpretation of "properly filed" that tolls only for applications that can be heard on the merits accords full respect to state court procedural rules. By denying tolling for

procedurally barred applications, the federal courts defer to the procedural laws of the states, as federalism requires, and give effect to the states' attempts through the use of those laws to control post-conviction litigation. Prisoners are encouraged to comply with state rules, instead of benefitting from disregarding them. And repetitive petitions that would otherwise be filed, particularly in capital cases, to create delay and extend the limitations period will not consume the resources of the state courts and prosecutors.

Thus, an interpretation of the tolling provision that suspends the limitations period only for applications that can be heard on the merits in state court strikes the balance between curbing delays and allowing for exhaustion, and achieves a "rough peace" between these conflicting goals. If a state allows a court to hear a post-conviction claim, and a defendant avails himself of that avenue of relief, the statute must be tolled. But if a defendant attempts to file an application in a court that clearly cannot hear its merits under state procedural rules, then the purpose of exhaustion is not served and the purpose of the limitations period can be advanced.

This interpretation thus encourages a defendant to fairly exhaust his state remedies and proceed to federal court as quickly as possible. It does not, however, benefit prisoners who file repetitive applications, mandatorily precluded under state law, that further neither the goal of exhaustion nor the goal of swift and final determinations, and that cause the excessive delays that the statute of limitations was directed against. In this way, this interpretation harmonizes the goals of the tolling provision with the goals of the statutory limitations period and with well-established principles of habeas corpus jurisprudence.

C. The Objections to an Interpretation That Denies Tolling for Barred Post-Conviction Applications Are Insubstantial and Do Not Outweigh its Benefits.

Lower federal courts and commentators have raised several objections to an interpretation of "properly filed" that denies tolling for mandatorily barred post-conviction applications. Some of them have complained that such an interpretation would involve the federal courts in an inappropriate and burdensome examination of state procedural rules and would "engraft" a "merits inquiry" onto the statute. Others have complained that such a rule would be too harsh on petitioners, and that prisoners who are wary of these harsh effects will flock to federal court rather than exhaust their state remedies. Finally, some courts have suggested that the delays identified with an interpretation that affords tolling for procedurally barred post-conviction applications are insignificant and that states could adopt new procedural rules that help minimize such delays. These arguments are fundamentally flawed in many ways. Moreover, any concerns that they raise about denying tolling for procedurally barred post-conviction applications are outweighed by the benefits of such an interpretation.

First, in its decision below, the Second Circuit protested that a rule that limits tolling to motions that could be heard on the merits would require federal courts to examine the procedural rules of the state, which, the court asserted, are often difficult to interpret. *See Bennett*, 199 F.3d at 122. But well-established doctrines of habeas jurisprudence, most notably the exhaustion doctrine itself, already require an examination of, and respect for, state procedural rules. In determining whether to dismiss a petition for failure to exhaust state remedies or to deem the claim procedurally barred, the federal courts already look to the same state procedural rules that they would have to apply under the tolling provision. *See Teague*, 489 U.S. at 297-

98; *Gray*, 518 U.S. at 161. This Court has, in fact, made such determinations on several occasions in ascertaining the availability of state remedies for exhaustion purposes. Thus, for example, this Court in *Teague*, in deciding whether the habeas petitioner had a remedy available under state law, considered the Illinois Post-Conviction Procedure Act and cases interpreting it to conclude that because the habeas petitioner had failed to raise his claim on direct review, he could not raise it on collateral review in the Illinois courts. 489 U.S. at 297. Similarly, in *Gray v. Netherland*, this Court applied procedural provisions of the Virginia Code to conclude that the habeas petitioner had defaulted the state remedy for his *Brady* claim because he had failed to raise it in a prior state petition and, under Virginia law, could not raise it in a second petition. 518 U.S. at 161; *see also Breard v. Greene*, 523 U.S. 371 (1998).

And, of course, lower federal courts have made similar determinations concerning the procedural rules of the various states on a quite routine basis. *See* Liebman and Hertz, §5.1b n. 64 at 236. For example, despite the Second Circuit's protests that it would have difficulty applying the procedural bars at issue in this case, it has applied these rules with no trouble on a number of occasions in its published opinions, much less its unpublished ones, in order to determine whether a claim was unexhausted or should be deemed procedurally barred under state law. *See, e.g., Strogov v. Attorney General*, 191 F.3d 188, 193 (2d Cir. 1998); *Jackson v. Leonardo*, 162 F.3d 81, 84 and n.7 (2d Cir. 1998); *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994), *cert. denied*, 514 U.S. 1054 (1995); *Washington v. James*, 996 F.2d 1442, 1446-47 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991). Indeed, the Second Circuit has interpreted in these cases the very words from the state statute that were cited in the court's opinion below as too difficult to apply. *See Reyes v. Keane*, 118 F.3d 136, 140 (2d Cir. 1997) (applying "unjustifiable failure" language of statute and rejecting

contention that ineffectiveness claim could not have been raised on the record); *Caballero v. Keane*, 42 F.3d 738, 740-41 (2d Cir. 1994) (deciding that ineffectiveness claim was off the record and a remedy was available in state court). And the District Courts in New York have applied these same rules on countless occasions. *See, e.g., Moates v. Walker*, 929 F.Supp. 82, 86 (E.D.N.Y. 1996); *Meachem v. Keane*, 899 F.Supp. 1130, 1138 (S.D.N.Y. 1995); *Bacchi v. Senkowski*, 884 F.Supp. 724, 731 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 683 (2d Cir.), *cert. denied*, 519 U.S. 894 (1996).

Moreover, the federal courts could use this pre-existing body of case law interpreting the states' procedural rules in applying the tolling provision. *See Hill v. Keane*, 984 F.Supp. 157, 158-59 (E.D.N.Y. 1997). A federal court thus ordinarily need look no further than its own decisions to apply a state's already familiar procedural rules. And using these cases defining the scope of the exhaustion doctrine as guideposts will ensure that the tolling provision is interpreted in accordance with its purpose: to allow petitioners to exhaust their state remedies. Thus, the Second Circuit's assertion that it would be difficult and inappropriate for federal courts to apply state procedural rules is belied by current habeas law and practice.

The second objection commonly raised to an interpretation that denies tolling for procedurally barred post-conviction applications is that it would "embroil" the federal courts in an evaluation of the "merits" of state applications. *Villegas v. Johnson*, 184 F.3d at 469-70; *see Bennett*, 199 F.3d at 122; *Lovasz v. Vaughn*, 134 F.3d 146, 149 (3d Cir. 1998). In some instances, this argument appears to be simply a restatement of the reluctance to review state post-conviction applications to make determinations on state procedural questions, *Bennett*, 199 F.3d at 122, while in others it appears to represent an independent fear of reviewing the true merits of the underlying claims, *see Lovasz v. Vaughn*, 134 F.3d at 149.

As to the former, the objection is no different from the one above, and is unavailing for the reasons stated above. As to the latter, the courts' fear is misplaced.

It is true that some early cases held or suggested that a petition must be "non-frivolous" in order to be properly filed, thereby implying that a review of the actual merits of the underlying claims would be necessary. *See Valentine v. Senkowski*, 966 F. Supp. 239, 241 (S.D.N.Y. 1997); *see also Villegas v. Johnson*, 184 F.3d at 469-70. Indeed, the objections to a "merits" inquiry appear to be in response to these cases. But the position advanced here and before the Second Circuit does not seek to exclude all "frivolous" petitions, only petitions that are mandatorily procedurally barred under state law. The federal courts thus need not review the merits of claims raised in state petitions, they need only apply well-established, and quite familiar, procedural rules.[4]

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[4]Ordinarily, this inquiry would entail an examination of such matters as whether an application was timely, whether a claim was raised or could have been raised on direct appeal, or whether the claim was raised or could have been raised in a prior petition. Indeed, in this case, only a simple inquiry of this nature would have been required, not any determination of the merits. As to these common procedural rules then, no "merits" inquiry is required.

Moreover, even if a procedural rule has a "safety valve" for particular types of claims or cases where manifest injustice may occur, the court applying the rule need inquire into the merits only to the same extent that it would already do so in deciding for exhaustion purposes whether a state court would entertain the claim. For example, in *Teague*, this Court noted that the Illinois procedural bar at issue had an exception for "fundamental unfairness," but determined that the state court would clearly not consider defendant's type of claim within this exception. 489 U.S. at 297-98. Federal courts need make no different or more intrusive examinations than this on the "merits," and the courts need not fear being "embroil[ed] . . . in problematic determinations of the merit of state court filings", *see Villegas*, 134 F.3d at 471, to any greater degree than they are already. *See also id.* at 475 (Garza, J., dissenting).

Nor can it be claimed that the plain language of the tolling provision compels the Second Circuit's interpretation, or that an understanding of the tolling provision that requires respect for state procedural rules would "engraft"something new onto the statute that Congress did not intend. To the contrary, the word "proper" ordinarily denotes "strictly accurate" or "correct," *Merriam Webster Collegiate Dictionary* 935 (10th ed. 1995), and a post-conviction application that fails to comply with mandatory state procedural rules cannot be considered to be either "correct" or "strictly accurate." Moreover, this Court has often used the term "properly" in discussing the exhaustion and procedural default doctrines to refer to claims presented to state courts in accordance with state procedural rules. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. at 848; *Harris v. Reed*, 489 U.S. 255, 265 (1989). These references also support the conclusion that only a post-conviction motion complying with all mandatory state procedural rules is "proper" and warrants tolling.

At least one court has nevertheless suggested that a literal reading of the statutory provision requires an interpretation that tolls even for procedurally barred motions, and that because the meaning of the terms are plain and unambiguous, no further inquiry is necessary or appropriate. *See Galindo v. Johnson*, 19 F.Supp.2d 697, 700-702 (W.D. Tex. 1998). But, there is, at the very least, sufficient ambiguity in the term "properly" to justify an inquiry into Congress's objectives in enacting the statutory provisions. *See* Liebman and Hertz, §5.1b n. 64, at 236 ("determining whether a state postconviction petition has been 'properly filed' is likely to be a source of substantial litigation, given the phrase's ambiguity"); Tushnet & Yakle, *supra*, at 30. Indeed, this ambiguity is amply demonstrated by the vast array of interpretations in the circuit courts, which differ so dramatically in the scope afforded the

tolling provision.[5] And, even if a literal reading of the terms could be said to support tolling for procedurally barred motions, a literal application of the language would not be required in a case such as this, where it would so thoroughly undermine, and indeed contravene, the obvious purposes of the statute.[6]

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[5]Some courts interpreting the language have allowed tolling for virtually any post-conviction application filed, including those barred by state successive petition rules and ones that are untimely under state law. *See Bennett*, 199 F.3d at 123. Others have interpreted the terms to allow tolling for most state applications, but at least nominally not ones that fail to comply with rules concerning the "time and place of filing." *See Villegas v. Johnson*, 184 F.3d at 470 n. 2; *Lovasz*,134 F.3d at 148; *see also Habteselassie v. Novak*, 209 F.3d 1208, 1212 (10th Cir. 2000). At least one other court has announced a rule that would deny tolling for applications that are untimely, but has held that it would nevertheless grant tolling if the state's time bar contained any exception at all. *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). Still other courts have declined to allow tolling for any application that a state court has held is procedurally defective. *See Freeman v. Page*, 208 F.3d 572, 576-77 (7th Cir. 2000); *Weekley v. Moore*, 204 F.3d 1083, 1086 (11th Cir. 2000); *Dictado v. Ducharme*, 189 F.3d 889, 892 (9th Cir. 1999).

[6]This Court has stated on many occasions that a literal application of statutory language is not required when it would "produce a result demonstrably at odds with the intentions of its drafters," *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)), or when it "'would thwart the obvious purpose of the statute,'" *Commissioner v. Brown*, 380 U.S. 563, 571 (1965); *Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941). The Court, of course, has declined to apply this rule when "no such consequences would follow and where . . . [a literal application] appears to be consonant with the purposes of the Act," *Brown*, 380 U.S. at 571 (quoting *Helvering*, 311 U.S. at 511). But here, the Second Circuit's interpretation would, as a practical matter, eliminate the operational effect of the statute of limitations as applied in capital cases, and, by this fact alone, produce a result "demonstrably at odds" with the intentions of its drafters.

Still, some courts have asserted that if Congress had intended to deny tolling for procedurally barred claims, it would have done so specifically. *Bennett*, 199 F.3d at 122; *Villegas*, 184 F.3d at 470. The force of this observation is all the greater, it is claimed, because the interpretation restricts the scope of the writ and gives greater preclusive effect to procedurally barred claims, thereby "alter[ing] the legal landscape." *Villegas*, 184 F.3d at 470. These arguments are unavailing. As an initial matter, Congress unquestionably sought to "alter the legal landscape" concerning access to federal court by enacting the statute of limitations. Indeed, in many ways it created a new legal landscape that did not previously exist. And while the statute must function appropriately in the existing scheme of habeas law and practice, an interpretation like the one advanced here, which makes the tolling provision consistent with exhaustion and which respects the procedural rules of the states, is more consonant with prior law than is one like the Second Circuit's, which divorces the tolling provision from exhaustion and ignores the states' procedural laws. In short, the question is not whether Congress intended to alter the legal landscape, it is whether the Second Circuit's interpretation effects a change in the landscape in a meaningful way.

Furthermore, there is no question that Congress could have been more specific in defining the scope of the tolling provision and giving an indication of which of the possible interpretations identified by courts and commentators it meant to be applied. It unfortunately failed to do so, either because its members could not agree on a definition, or because the types of state procedures that could be invoked were so varied that Congress felt it was best to leave the application of the provision to the courts. In either event, the absence of specificity, by itself, does not resolve the question of what Congress intended; it simply makes clear that this Court has been left the task of applying the provision in a manner consistent with the aims of both the statute of limitations and the tolling provision.

The third objection sometimes noted to an interpretation that denies tolling for procedurally barred applications is that it would be overly harsh on state prisoners, either because of their lack of knowledge or because some litigants may have a reasonable belief that in their particular case, the state court may decide not to apply the procedural bar at issue. These prisoners, the argument goes, may deplete the limitations period on a claim, raised in good faith, that is eventually held to be procedurally barred. *See Habteselassie*, 209 F.3d 1208, 1212 n.5 (10th Cir. 2000); Liebman and Hertz, §5.1b n. 64 at 236; *see also Freeman v Page*, 208 F.3d 572, 576 (7th Cir. 2000) (rejecting "subjective" test of properly filed). But, as to the former concern, habeas law has traditionally imposed on petitioners a requirement of knowledge of the law, often with regard to rather complex rules of habeas procedure. More specifically, both the Court's procedural default and abuse-of-the-writ jurisprudence "impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones . . . ." *McCleskey v. Zant*, 499 U.S. at 493. The interpretation of the tolling provision advanced here does no more. It requires only knowledge of the states' procedural bars in the post-conviction context, which petitioners are, in any event, charged with knowing under the procedural default doctrine.

Moreover, a petitioner who files a state post-conviction application with an arguably valid contention that a state court might overlook the procedural bar need not fear the statute of limitations under the interpretation advanced here. If a petitioner colorably invokes an exception to the state's procedural bar, or if the state courts regularly overlook the procedural bar in order to review claims such as the petitioner's, the ambiguity should be resolved in favor of the petitioner. This is consistent with the treatment that such an ambiguity would receive if the federal court were reviewing the claim to determine whether the petitioner must return to state court to

exhaust the claim or whether it should be deemed procedurally barred. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989) (noting presumption in favor of exhaustion); *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (same); Liebman and Hertz §23.1 at 868. In the exhaustion context, if there is a legitimate reason to believe the state court will hear a claim despite a potential procedural bar, the claim is unexhausted and the petitioner will be required to return to state court for this purpose. *See Caballero*, 42 F.3d at 740-41; *Banks v. Horn*, 126 F.3d 206, 212-13 (3d Cir. 1997); *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). Indeed, in applying the very procedural bar at issue in this case, the Second Circuit has found claims unexhausted when a defendant has made such colorable arguments. *See Caballero*, 42 F.3d at 740-41. In such circumstances, the petitioner would necessarily get the benefit of the tolling provision.[7] Resolving such disputes in this manner keeps the tolling provision true to the purposes of exhaustion, provides federal courts with a pre-existing body of case law to aid in determining such matters, and protects petitioners with objectively reasonable grounds to believe that a state procedural bar will not be applied.

The fourth objection sometimes raised to an interpretation that gives effect to state procedural bars is that it will make prisoners wary of filing their claims in state court, causing them to flock to federal court prematurely and discouraging exhaustion. *See Villegas*, 184 F.3d at 472. But petitioners need not fear exhausting state remedies under the

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[7]Moreover, should the circumstances of a future case require it, this Court could adopt other means to protect prisoners who were unfairly disadvantaged by the rule. For example, where the issue is presented, this Court may well conclude that the statute may be equitably tolled. Several of the Courts of Appeals have already so concluded. *See Smith v. McGinniss*, 208 F. 3d 13, 17 (2d Cir. 2000) (adopting equitable tolling and citing other circuit court cases doing the same).

interpretation advanced here. Any legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling. So, for example, a petitioner in New York who raises a typical *Brady* or newly discovered evidence claim, or a claim of ineffective assistance of counsel based on events that did not occur in court, can invoke the state's post-conviction processes without any legitimate concern. The state's rules fully allow such claims to be brought post-appeal, and no issue will arise regarding tolling in these cases. Indeed, most states' post-conviction rules would allow for a first post-conviction application based on matters that are outside the record, which would allow prisoners to bring many of the most typical post-conviction claims and obtain tolling for these state applications. Moreover, even when a state procedural rule is arguably applicable, a petitioner need not be concerned with exhausting his state remedies so long as he or she can point to an exception to the procedural bar that he or she has reasonably invoked, or to other state cases that have ignored the bar to hear a claim similar to the petitioner's. In such circumstances, the petitioner will obtain the benefit of tolling. Only when a petitioner is clearly barred from proceeding under state law and engages in unnecessary or repetitious litigation should the petitioner fear state court procedural rules, and such prisoners are quite properly encouraged to proceed directly to federal court rather than invoking unavailable processes of the state courts.

Moreover, as a practical matter, it seems unlikely that petitioners who now routinely engage in extensive post-conviction litigation in the state courts will abandon all such efforts, avoiding any attempt at invoking any state procedure, and flock to federal court with premature petitions. Properly invoked state remedies routinely offer viable avenues of relief to prisoners, and foregoing these possible remedies would not be in the prisoner's best interests.

Of course, some petitioners who seek to ensure compliance with the statute of limitations may file premature petitions within one year of the time their convictions become final, regardless of the status of the state litigation. Indeed, any statute of limitations would result in some cautious prisoners taking this tack. But the Court has already afforded a procedure for such premature petitions. Under *Rose v. Lundy*, the federal court need only dismiss the petition without prejudice. 455 U.S. at 522. And, under the interpretation advanced here, a petitioner in this situation is assured that he or she will obtain the benefit of tolling because there will already be a determination on the facts of petitioner's case that the state proceeding is necessary for exhaustion, and thus tolling would be warranted.[8]

The Second Circuit and other courts have nevertheless apparently found the *Rose v. Lundy* remedy inadequate. The court asserted that deciding whether to dismiss a case on exhaustion grounds is often not "clear-cut," and that a prisoner who seeks to ensure timeliness by filing prematurely within the one-year limitations period would require federal courts to make "determinations as to the proper outcome of pending state proceedings based on state law when a state court is positioned to make the very same decision." *Bennett*, 199 F.3d at 122; *see also Habteselassie*, 209 F.3d at 1212 n.6. But this would be an unusual case. Here again, the dire predictions of flight to federal court are overstated, and in most cases, federal courts would examine the state procedural rule after the state proceedings are completed. Moreover, even when petitioners do hasten to

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[8]Indeed, the states would be forced in such cases to make an election. They could either argue that the claim advanced is unexhausted and admit that the procedure promotes the purposes of exhaustion and warrants tolling, or they could argue that the claim is procedurally barred and allow the case to proceed in federal court. In either case, the petitioner escapes the statute of limitations.

federal court, in most cases the state rule at issue is easily applied and there is no realistic possibility of conflict on these issues. The Second Circuit has, after all, applied the procedural bars involved in this case on many occasions without difficulty.

But even in the unusual case, when the federal court must make a close call concerning a procedural rule while a state court has the same procedural issue before it, the federal court will not be placed in an awkward position. Any such true ambiguities in the application of the procedural bar will be resolved in favor of petitioner. If there is a realistic likelihood that the state court will review the issue, then the petition will be dismissed. This will encourage exhaustion, promote comity, and avoid the specter of unseemly disagreements between federal and state courts. And, in a worst-case scenario, the federal court could simply hold the petition in abeyance for the pendency of the state proceedings. Moreover, even if comity concerns might still be implicated in an extremely rare case, there would be no reason to abandon an interpretation of the statute that gives effect to state court procedural bars simply because of a rare case in which it might present a problem. This Court could address the rare case when and if the circumstances ever presented themselves.

Finally, some courts, including the Second Circuit, have made various arguments minimizing the delays that would be engendered under an interpretation of §2254(d)(2) that tolls for procedurally barred motions. For example, the Second Circuit declared below that state prisoners have "little incentive to delay determination of their habeas petitions," *Bennett*, 199 F.3d at 123, and that the state need not fear delays from repetitious litigation for this reason. *Id.*; *see also Villegas*, 184 F.3d at 472. But this observation simply does not apply to prisoners in capital cases, who in fact have a very powerful incentive to delay and who, under the Second Circuit's interpretation, are encouraged to file repetitive litigation to delay as much as possible.

Inasmuch as Congress expressed in no uncertain terms both its belief that these delays by capital prisoners were intolerable and its intention to limit such delays, it cannot be concluded that Congress would find the Second Circuit's interpretation acceptable.

Moreover, as to prisoners in non-capital cases, whether an "incentive" to delay exists or not, state prisoners often engage in repetitious litigation that in fact causes years of delay. *See* Flango & McKenna, *supra*, at 245. State prisoners may engage in such needless litigation for any number of reasons, such as, as some have suggested, because repetitious litigation has a therapeutic value for prisoners, *see* Flango & McKenna, *supra*, at 274, or because prisoners need to hold out hope that they will escape their confinement and they thus find it necessary to deny the finality of their convictions. Regardless of the reason, however, Congress perceived these delays as pernicious in non-capital as well as capital cases, and enacted a statute of limitations to address them. Thus, whatever the Second Circuit's opinion as to the incentives of state prisoners, Congress's perception of the actual problems of delay in non-capital cases must be respected.

Similarly unavailing is the suggestion that states can control these delays by creating "conditions precedent" to filing. *See Habteselassie v. Novak*, 209 F.3d at 1210; *Villegas*, 184 F.3d at 471, 472-73; *see also Bennett*, 199 F.3d at 123. These courts have suggested that such controls could take the form of bars to filing imposed on particular abusive filers, *Habteselassie*, 209 F.3d at 1210; *Villegas*, 184 F.3d at 473, or the form of statutory pre-conditions to filing under a scheme similar to the pre-filing review required for second federal habeas petitions under AEDPA's revision of §2244(b). *See Habteselassie*, 209 F.3d at 1212; *Villegas*, 184 F.3d at 471, 472-73.

But a requirement that state courts enact such provisions in order to limit the tolling provision and obtain the benefits of the statute of limitations would convert the statute into a "straightjacket," severely limiting the ways in which a state court can address the obdurate problems of repetitive prisoner litigation. Such a rule cannot be squared with principles of federalism that require that the states retain the authority, within the confines of the Constitution, to address difficult policy issues in the manner that they see fit. *See Smith v. Robbins*, __ U.S. __, 120 S. Ct. 746, 757-58 (2000); *Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). While some states may choose to attempt to control excessive prisoner litigation in the manner suggested by these courts, others have chosen different procedural schemes that may serve the interests in managing post-conviction litigation just as well, or even better. Any attempt to validate only certain types of procedural schemes would "contravene [the Court's] established practice, rooted in federalism, of allowing the States wide discretion . . . to experiment with solutions to difficult problems of policy." *See Smith v. Robbins*, 120 S. Ct. at 757. As this Court stated only recently, "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the states from the top down." *Id.* at 758; *see also Murray v. Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring).

Moreover, the courts that hold that the only procedural requirements that will be respected under the tolling provision are those that are in the form of a "condition precedent" to filing, *see Habteselassie*, 209 F.3d at 1210, fail to give effect to all the words in the tolling provision, and thus their analysis is fatally flawed. Congress required not only that an application be "filed," but that it be "properly filed." Under a view that requires a state to establish "pre-conditions" to filing, all a federal petitioner need show to get the benefit of the tolling provision is that the state allowed him, eventually, to file the

application. This interpretation directly contravenes the "cardinal principle of statutory construction that [the Court] must '"give effect, if possible, to every clause and word of a statute."'" *Taylor v. Williams*, __ U.S. __, __, 120 S.Ct. 1495, 1519 (2000) (quoting *United States v. Mensche*, 348 U.S. 528, 538-39 (1995)).

Thus, the courts criticizing an interpretation of "properly filed" that accords respect to mandatory state procedural rules have failed to raise any valid objection to it, particularly one that would outweigh its benefits. And whatever the alleged ills of this interpretation, they do not justify adopting a rule such as the Second Circuit's that would effectively nullify the statute of limitations, extend the tolling provision far beyond its purpose to allow for exhaustion, and undermine state efforts to control post-conviction litigation.

D. The Interpretations of "Properly Filed" Applied in Other Circuits that Toll for Procedurally Barred Motions Suffer from the Same Defects as the Second Circuit's Rule and Do Not Provide Any Better Alternative to that Rule.

The Third, Fifth, and Tenth Circuits have not adopted the Second Circuit's interpretation that allows tolling for any application "recognized as such" under state law. The Third and Fifth Circuits have instead adopted a rule that denies tolling for applications that fail to comply with rudimentary filing requirements and state procedures regarding the "time and place of filing."[9] The Tenth Circuit has held that any state rule that is written as a pre-condition to filing, such as a scheme similar to AEDPA's second petition filing requirement (*see* 28 U.S.C.

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[9]This interpretation has also been applied by the Fourth and Sixth Circuits in unpublished opinions. *See Young v. Mohr*, 1999 U.S. App. LEXIS 34018 (6th Cir. 1999); *McSheffrey v. Angelone*, 1999 U.S. App. LEXIS 2735 (4th Cir. 1999).

§2244(b)), or any pre-condition to filing judicially imposed on a particular abusive filer, will also be given effect under the tolling provision. These interpretations suffer from the same defects as the Second Circuit's rule and do not offer a viable alternative to an interpretation that denies tolling for procedurally barred motions.

The Third and Fifth Circuits' "time and place of filing" rule is inadequate for three reasons. First, this interpretation would still allow many needless delays that do nothing to further the purpose of the tolling provision. Under this interpretation, as long as an application is timely under state law, prisoners can file claims already raised on direct appeal or claims raised in a prior motion and still obtain the benefit of tolling. Such repetitious procedurally barred applications do not advance the purposes of exhaustion and indeed serve no purpose other than delay. There is simply no reason to tolerate such delays.

Second, the "time and place of filing" rule, as interpreted, would not prevent capital prisoners in most states from causing extensive delays to avoid execution for as long as possible. The rule has recently been held to preclude tolling only when the state imposes an absolute time bar, and not when the time bar contains any type of exception. *See Smith v. Ward*, 209 F.3d at 385 (tolling for time-barred state application because state statute contained exceptions for claims based on new facts and new rules of law). Most states that have adopted a statute of limitations for post-conviction applications, however, have not been so harsh as to do so without exception. For example, state post-conviction statutes of limitations ordinarily permit the filing of claims based on facts that could not have been discovered previously and for novel claims based on retroactively effective changes in the law. *See, e.g.*, Del. Super. Ct. Crim. R. 61(i)(1); Fla. R. Crim. Proc. 3.850(b); Iowa Code §822.3; La. Code Crim. Proc. art. 930.8(A)(1),(2). If state prisoners can file late applications in state court under such

statutes and still obtain tolling, they can extend the limitations period indefinitely simply by filing such late, time-barred motions. Here again, the Third and Fifth Circuits' rule fails to avoid the serious flaws in the Second Circuit's interpretation.

Third, the Third and Fifth Circuits' rule offends notions of federalism. It shows respect for only a small fraction of the states' procedural rules and requires that a state use a statute of limitations, indeed an absolute time-bar, to control post-conviction litigation in order to avoid extensive delays under the tolling provision. But all of the states' procedural efforts to control prisoner litigation are due respect under principles of federalism, and a requirement that states enact time-bars to avoid tolling delays creates a statutory straightjacket that again "imposes a single solution from the top down." *Robbins*, 120 S.Ct. at 758.

Moreover, it may be unwise even from a state prisoner's point of view to require states that have no time limitation on post-conviction motions, like New York, to adopt time limitations, or to encourage states with statutory exceptions to time-bars to abandon those exceptions. These states have shown concern for prisoners who may obtain information suggesting that they were wrongfully convicted after what would otherwise be a reasonable time, and the states may prefer to rely on rules that limit successive petitions or that preclude the use of collateral litigation as an appeal to channel resources to more worthy claims. Respecting only state time bars, or only absolute time bars, may encourage states to enact legislation far more harsh than they would otherwise be inclined to consider.

The Third and Fifth Circuits' view, then, fails to avoid the serious deficiencies of the Second Circuit's rule and raises additional concerns for prisoners who may find themselves facing new and very harsh state time bars.

The Tenth Circuit's view suffers from many of these same defects. That court requires petitioners to comply with any pre-conditions to filing that a state court may choose to impose on particular abusive filers and to comply with other statutory "conditions precedent," such as ones similar to AEDPA's second petition pre-filing review. *See* §2244(b). This interpretation, like the Fifth, Third, and Second Circuits' rules, fails to give effect to state procedural rules unless they are not imposed as "pre-conditions" to filing. It allows dilatory, repetitive motions that go well beyond the purposes of exhaustion. And, once again, this view contravenes principles of federalism by crediting only particular solutions, which the states, in their experience, may be reluctant to impose for quite legitimate reasons. State legislators with genuine objections to enacting "condition precedent" rules should not be required "to follow any particular federal model" in post-conviction proceedings in order to avoid extensive delays under the tolling provision. *See Giarratano*, 492 U.S. at 13 (O'Connor, J., concurring).

Thus, because the interpretations of the Third, Fifth, and Tenth Circuits bear the same dangerous deficiencies as the Second Circuit's rule, they provide no viable alternative to the Second Circuit's formulation.

E. Because Bennett's Second State Post-Judgment Application Was Procedurally Barred Under State Law, It Was Not "Properly Filed" and Did Not Toll the Statute of Limitations.

When Bennett filed his second application for post-conviction review under section 440.10 of the New York Criminal Procedure Law, he included one claim that had already been rejected by the Appellate Division and two claims predicated on the record of his trial that had taken place eleven years earlier. These claims were mandatorily procedurally

barred under state law, which precludes a defendant from raising issues on collateral attack that were or could have been raised on direct appeal. Thus, Bennett's motion was not "properly filed," under the correct interpretation of that phrase, and did not toll the statute of limitations.

Under New York law, a collateral attack on the judgment of conviction under section 440.10 is subject to three mandatory procedural bars, which are designed to prevent this section from being used as a substitute for direct appeal. *See* New York Crim. Proc. Law §440.10(2); *People v. Cooks*, 67 N.Y.2d 100, 103, 500 N.Y.S.2d 503, 505 (1986). Two of those are relevant to Bennett's second post-conviction motion. Under section 440.10(2)(a), a defendant is precluded from raising an issue that was "previously determined on the merits upon an appeal from the judgment" absent a retroactively effective change in the law. Under section 440.10(2)(c), a defendant is barred from raising a claim when "sufficient facts appear on the record of the proceedings underlying the judgment to have permitted" review of the claim on appeal but review does not take place due to the defendant's "unjustifiable failure" to raise the claim.

These procedural bars serve vital interests of the state. They ensure that the state has an opportunity to resolve the issues raised "shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal." *Murray v. Carrier*, 477 U.S. 478, 490-91 (1986) (quoting *Reed v. Ross*, 468 U.S. 1, 10-11 (1984)). They also "promote[] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together as quickly after trial as the docket will allow . . . ." *Id.* Failure to raise a claim on appeal "reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and 'undercut[s] the State's

ability to enforce its procedural rules.'" *Id.* (quoting *Engle v. Isaac*, 456 U.S. at 129).

All of Bennett's claims in his second post-judgment motion to vacate his conviction were barred under these provisions. Bennett first argued that the trial court's preclusion of his defense witness for lack of a statutory notice was reversible error. This claim had been raised on direct appeal, and, although the Appellate Division agreed that error occurred, the court found the error harmless beyond a reasonable doubt. *People v. Bennett*, 128 A.D.2d at 540, 512 N.Y.S.2d at 473. Thus, the issue had previously been decided against Bennett on direct appeal. Moreover, Bennett never established that there had been any retroactively effective change in the law.[10] As a result, this claim was mandatorily barred under state law.

Second, Bennett made a half-hearted argument, in the midst of his complaints about the trial court's preclusion of his witness, that "[t]he prosecutor should have been charged . . . for misconduct" because he "never mention[ed] the lack of notice prior to trial . . . leading the court to believe nothing was wrong" (JA 119). This claim was based on the trial record and could have been made on appeal. Bennett, however, did not include this claim among his six appellate issues. Moreover, Bennett never sought to invoke the "unjustifiable failure" language of the statute to excuse his failure to raise the issue. As a result, this issue too was mandatorily barred under section 440.10(2)(c).

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[10]Although Bennett made a passing reference to "recent changes in the law as it relates to harmless error" (JA 114), he never identified what changes he was referring to nor did he cite any cases in support of his conclusory assertion. He also never established or even alleged that the supposed changes were retroactively effective on collateral review. Thus, Bennett never established any retroactively effective change in the law, and indeed failed to make even a colorable argument that there had been one.

Third, Bennett made a claim that he was deprived of his right to be present at the pre-trial *Sandoval* proceeding to determine which prior crimes could be used against him. This too was an on-the-record claim that could have been raised on direct appeal. Indeed, Bennett specifically asserted that "it is clear from the record and the court reporters [sic] transcription of the record that the petitioner was not present . . . ." (JA 120). Bennett then relied on the trial transcript in presenting his argument: he cited to the portion of the transcript of the proceedings immediately prior to the hearing, he observed that the transcript stated "Appearances same as previously noted," and he argued that he was not noted to have been present on the previous day (JA 119-20). Bennett could have used this same portion of the record to make this identical argument on appeal, but he failed to do so. For this reason, and because Bennett never invoked the "unjustifiable failure" portion of the statute in an attempt to excuse his failure, his claim was procedurally barred.[11]

Thus, because all of the issues raised in Bennett's application were mandatorily procedurally barred under state

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[11]Nor did the fact that the state argued that Bennett was present at the *Sandoval* proceeding make his argument one that was outside the record. The state too cited to a portion of the record, namely a notation in the trial court's papers, to support its view that Bennett had been present (JA 129). Under state law, such disputes over conflicts in the record in general, and disputes over record-based conflicts regarding a defendant's presence at trial in particular, are resolved prior to or during the appeal by a motion to resettle the record, *see People v. Browne*, 195 A.D.2d 946, 601 N.Y.S.2d 746 (2d Dept. 1993), or by holding the appeal in abeyance and remanding for a hearing in front of the trial court, *see, e.g., People v. Michalek*, 82 N.Y.2d 906, 609 N.Y.S.2d 172 (1994); *People v. Odiat*, 82 N.Y.2d 872, 874, 609 N.Y.S.2d 166, 167 (1993). These procedures ensure that the dispute is settled in a timely manner while memories are still fresh. And, under either procedure, the defendant is required to bring the challenge prior to or during the appeal, which Bennett failed to do.

law[12] and the state trial court in which the motion was filed could not hear the merits of the claims, Bennett's motion was not "properly filed." He was thus not entitled to the benefits of the tolling provision.

Nor does the fact that the state trial court uttered a one-word denial and thus did not explicitly invoke the procedural bar make Bennett's application "properly filed" so as to afford him the benefits of tolling. This is so both because the "plain statement" rule should not be incorporated into the tolling provision, and because even if it was, it would not apply under the facts of this case.

The plain statement rule was developed as an aid to applying the adequate and independent state ground doctrine. As applied to cases on direct review, that doctrine precludes this Court's consideration of a federal claim when there exists an independent and adequate state ground upon which the judgment is based because, in such cases, this Court's decision on the federal issue can have no effect on the state court judgment and would therefore be advisory. *See Coleman v. Thompson*, 501 U.S. at 729; *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). The preclusion of review of the federal claim

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[12]It is possible that Bennett was also attempting to raise a claim of ineffective assistance of trial counsel in this motion. In the middle of his discussion of the trial court's error in precluding the defense witness, Bennett wrote, "Thus, if counsel was negligent in his duties to the petitioner, the issue would more properly have been to hold counsel in violation under *People v. Barrett*, 145 A.D.2d 842 [3d Dept. 1988][finding ineffective assistance of counsel]. . . ." (JA 117). This claim too, however, was procedurally barred in state court. It was based solely on counsel's failure to argue the witness preclusion claim properly and thus was on the record and could have been raised on direct appeal. *See Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997); *People v. Baxter*, 262 A.D.2d 1068, 1068, 692 N.Y.S.2d 636, 637 (4th Dept. 1999); *People v. Orr*, 240 A.D.2d 213, 214, 659 N.Y.S.2d 1 (1st Dept. 1997).

comes solely from the adequacy and independence of the judgment below, and the question to be decided is the Court's ability to review the judgment itself. Thus, the nature of the judgment below is critical, as is an examination of any decision upon which the judgment is based. The plain statement rule helps in this examination by ensuring that a "mere possibility" that an adequate and independent state ground exists does not deprive this Court of jurisdiction. *See Long*, 463 U.S. at 1044. In the habeas context, while the doctrine does not technically affect the jurisdiction of the court, the preclusion of federal review still depends directly upon the adequacy and independence of the state court judgment, and the plain statement rule ensures that the state judgment that carries a preclusive effect contains the predicate for it. *Coleman*, 501 U.S. at 729-30; *Harris v. Reed*, 489 U.S. at 261-62.

Under the statute of limitations, however, the preclusion of federal review does not arise solely from the existence of an independent state ground supporting the state court judgment. It arises from the delay occasioned by the petitioner. It results from periods of delay independent of those resulting from any state court application, and from the delay occasioned by the petitioner's attempt to engage in repetitive litigation in state court by invoking a remedy that is unavailable and that therefore cannot advance the tolling provision's purpose to allow exhaustion. Indeed, it is the rule of exhaustion rather than the independent and adequate state ground doctrine that underlies the tolling provision. In applying the tolling provision then, it is unnecessary to conclude that the state court judgment is independent and adequate of the federal claim, and a rule that is designed to assist that inquiry and to ensure that these predicates are present need not be applied.

True, an interpretation of state law may be required in applying the statute of limitations, and the state court decision is of course important in making that determination. Thus, if the

state court examined the merits of the petitioner's claim other than as an alternative ground for denial, petitioner would be able to argue that relief was in fact available to him at the time he made the motion and would obtain the benefit of the tolling provision. But when the court is simply silent in the face of an otherwise clearly applicable mandatory procedural bar that the federal court would readily apply under the exhaustion doctrine, there is no reason to apply the plain statement rule's conclusive presumption that the state court decision was based on federal law rather than the state procedural bar. Indeed, the plain statement rule's presumption is unwarranted in such circumstances because it almost certainly would be incorrect. *See Coleman*, 501 U.S. at 737 ("the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time"). Moreover, applying the rule under such circumstances would "place burdens on the States and state courts in exchange for very little benefit to the federal courts." *Id.* at 738. It would burden the states by denying them the benefit of the statute of limitations in many cases, and it would burden the state courts by requiring them to write opinions on every state prisoner's application for post-conviction relief no matter how many he files. Thus, the plain statement rule should not be incorporated into the tolling provision.

Furthermore, even if the plain statement rule were imported into the context of the tolling provision, Bennett could not obtain the benefit of it. The rule does not apply unless the state court decision "'fairly appears to rest primarily on federal law, or to be interwoven with the federal law.'" *Id.* at 735. In making these types of determinations, this Court has looked to the terms of the procedural rules to determine whether they are mandatory or permissive, the state court decisions applying the bar, and the basis for opposition to the claim. *Id.* at 740-44. Here, the language of the two procedural bars at issue is mandatory: the state statutory bar requires that "the court *must*

deny a motion to vacate a judgment when" the conditions are met. N.Y. Crim. Proc. Law §440.10(2) (emphasis added). This is in direct contrast to the procedural rules that immediately follow, which specifically state that "the court *may* deny a motion to vacate a judgment" under other specified conditions. N.Y. Crim. Proc. Law §440.10(3) (emphasis added). Moreover, state cases routinely treat the bars at issue as mandatory and as precluding merits review. *See Arce v. Smith*, 889 F.2d 1271, 1273 (2d Cir. 1989), *cert. denied sub nom. Arce v. Berbary*, 495 U.S. 937 (1990). Furthermore, the state opposed the first two claims, the only federal claims in the petition,[13] entirely on procedural grounds (JA 127-28). For these reasons, and because the state courts had already written three decisions addressing the validity of Bennett's conviction, it was not surprising that the state court issued only a one word denial of Bennett's claims. It does not fairly appear that this one word denial of relief as to Bennett's clearly barred claims involved a review of federal law or was interwoven with federal law. As a result, the plain statement rule does not apply here.

In short, Bennett attempted to raise his claims both in the wrong court and at the wrong time. State law required that Bennett's claims be advanced in the Appellate Division at the time of his direct appeal. But Bennett ignored the state's procedural rules: he brought a motion in the trial court eleven years after his appeal had been concluded. This motion did nothing to exhaust his state remedies; it was procedurally barred and the state trial court could not adjudicate the merits of the claim. Indeed, Bennett's motion was nothing more than an exercise in unnecessary repetitive litigation. There is simply no

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[13]As to his third claim, Bennett made clear in his motion papers that he was asking for relief under *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761 (1992), and *People v. Favor*, 82 N.Y.2d 254, 604 N.Y.S.2d 414 (1993). Those decisions are based exclusively on state law. *Favor*, 82 N.Y.2d at 262, 604 N.Y.S.2d at 498-99.

reason to be found either in the purposes of the statute of limitations or those of the tolling provision to accord the benefits of tolling for such a motion.

Because Bennett's second post-conviction motion was mandatorily procedurally barred under state law, it was not "properly filed" within the meaning of the tolling provision. The Second Circuit thus incorrectly tolled the statute of limitations during the pendency of this motion. For this reason, the judgment of the Second Circuit should be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

v.

TONY BRUCE BENNETT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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PETITIONER'S QUESTION PRESENTED

Is a state post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions, if it is procedurally barred from review under state law?

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Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765 (1995) 1

STATEMENT OF THE CASE

The Crime and the Trial

In the early morning of February 1, 1983, New York City police officers Kevin Perham and Willard Cleaver observed a blue Chevrolet Nova occupied by four black men parked on a street in Queens County, New York. JA 19. The officers had no contact with the Nova or its occupants before leaving to respond to another call. *Id.* When that call proved unfounded, the officers returned to the Nova and observed that one of its occupants had left the vehicle. *Id.* The officers pulled up behind the Nova as it stopped to let a second passenger out. *Id.* When the officers turned on their red police lights, the car, now carrying two occupants, sped away. *Id.* Believing the car to be connected with "some robberies in two precincts," Perham and Cleaver pursued it. JA 48-49. Shots were exchanged but no one was injured. JA 49. The officers soon cornered the Nova behind a school and its two remaining occupants fled through a field. *Id.*

Respondent, Tony Bennett, and his co-defendant, Derrick Chisholm, were arrested twenty-two days later and charged with offenses relating to the chase. JA 49. In March, 1984, Bennett and Chisholm were tried jointly in the Supreme Court of New York, Queens County. JA 123. The prosecution's case rested entirely on the identification testimony of officers Cleaver and Perham, both of whom testified that they picked Bennett out of a lineup on February 23, 1983.[1] JA 19-20. Bennett's fingerprints

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[1] The unreliability of eyewitness identification is well documented. *See, e.g.*, Gary L. Wells & Eric P. Seelau, *Eyewitness*

were not found anywhere in or on the Nova, JA 20, and the prosecution offered no physical evidence against him. Officer Collins, who assisted in the investigation, testified that both officers told him two days after the incident that they were uncertain whether they could identify the perpetrators. JA 20.

Julian Ishmael testified that Bennett was with him at Ishmael's home at the time of the incident. JA 21. Ishmael explained that as he and Bennett were about to leave Ishmael's home, they heard shots and saw flashing lights. They went to the street corner to see what was happening. JA 21. Half an hour later, they returned to Ishmael's house, where Bennett spent the night. *Id.* After Bennett's next witness, Elias Mahamed, was placed under oath, the prosecutor objected to his testimony on the ground that Bennett had failed to include Mahamed in his notice of alibi. *Id.* Bennett argued that Mahamed was not an alibi witness, but was being called to corroborate Ishmael's testimony because he could verify that he saw Ishmael and Bennett together in the crowd after the chase. JA 22. Although the prosecution was made aware of Bennett's intention to call Mahamed one week prior to trial, the trial court ruled that Bennett's failure to include Mahamed in the notice of alibi precluded his testimony. *Id.*

Identification: Psychological Research and Legal Policy on Lineups, 1 Psychol. Pub. Pol'y & L. 765 (1995); *see also United States v. Wade*, 388 U.S. 218 (1967). The problems are compounded when the witness and the suspect are members of different races. *See, e.g.*, Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934, 937-51 (1984).

Bennett also testified and confirmed that he had been at Ishmael's home at the time of the chase. JA 22. He explained that he and Ishmael heard shots as they were leaving the house. *Id.* They went to the scene and saw police officers crouched behind car doors with guns drawn. JA 22-23. Bennett maintained that he spoke to Mahamed, who was watching the scene from his front door. Bennett said he subsequently returned to Ishmael's house, where he spent the night. JA 23.

On March 27, 1984, Bennett was found guilty of two counts of Attempted Murder in the First Degree, Criminal Possession of a Weapon in the Second Degree, two counts of Reckless Endangerment in the First Degree, Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Motor Vehicle. JA 24. His co-defendant, Chisholm, was found not guilty on all counts. *Id.* At Bennett's September 25, 1984 sentencing hearing, the trial judge said he was "quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was and the police were just as firmly convinced that Chisholm was [involved] as [they were that] Bennett was [involved]." JA 25. Bennett was sentenced to concurrent indeterminate prison terms of from fifteen years to life on the attempted murder counts, and to lesser terms on the remaining counts, to run consecutively to the greater terms. JA 25-26.

The Direct Appeal

Bennett raised six claims on direct appeal, one of which was that he had been deprived of his rights under the federal and state constitutions to present a defense

when the trial judge precluded Elias Mahamed's testimony for failure to comply with the state's alibi notice requirement. JA 26-28. On March 2, 1987, the Appellate Division affirmed the judgment of conviction, agreeing with Bennett that the trial court erred in precluding Mahamed's testimony, but finding the error harmless "in light of the overwhelming evidence of guilt." *People v. Bennett*, 512 N.Y.S.2d 472, 473 (2d Dept. 1987). Bennett's March 19, 1987, application for leave to appeal to the New York State Court of Appeals was denied on May 7, 1987. *See People v. Bennett*, 517 N.Y.S.2d 1034 (1987). His conviction became final on August 5, 1987, when the time for filing a petition for writ of certiorari with this Court expired.

State Post Conviction Proceedings

On May 28, 1991, Bennett moved, pursuant to New York CPL § 440.10, to vacate his convictions on grounds of newly discovered evidence and ineffective assistance of counsel. JA 104. The trial court denied the motion in a written decision dated August 2, 1991. JA 95. Bennett did not seek leave to appeal.

Bennett filed a second *pro se* application for post-conviction relief pursuant to New York CPL §§ 440.10 and 440.30 on June 5, 1995. JA 121. This application clearly stated that the submission was necessary to satisfy the exhaustion prerequisite to pursuing federal habeas corpus relief, *see* JA 114, and alleged that Bennett's Sixth and Fourteenth Amendment rights were violated when the trial court barred the testimony of Elias Mahamed. JA 115. Bennett also maintained the prosecutor committed

misconduct by withholding his objection to Mahamed's testimony until after the witness was placed under oath in the presence of the jury. JA 115; 119. Bennett further alleged that his right to be present at all material stages of trial was violated when his pre-trial *Sandoval* hearing[2] went forward in his absence. JA 120.

The state opposed the claims in Bennett's 1995 application on both procedural and substantive grounds. With regard to Bennett's claim that the trial court erred in barring Mahamed's testimony, the state relied exclusively on CPL § 440.10(2)(a),[3] contending that this "precise issue" had already been resolved on direct appeal. JA 128. In response to the prosecutorial misconduct claim, the state argued both that Bennett had not established facts demonstrating prosecutorial misconduct and that because the Appellate Division had already found the error in excluding Mahamed's testimony harmless, Bennett was unable to establish prejudice. The state defended against the right to be present at the *Sandoval* hearing claim on several grounds. First, it argued that the trial record established that Bennett had in fact been present at

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[2] In New York, a "*Sandoval* hearing" is a pre-trial proceeding in which a trial court makes "an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility." *People v. Sandoval*, 314 N.E.2d 413, 416 (N.Y. 1974) (citations omitted).

[3] CPL § 440.10(2)(a) provides that a "court must deny a motion to vacate a judgment when: (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue[.]"

the hearing. JA 129. Second, it argued that even if the record did not conclusively demonstrate Bennett's presence, it contained facts sufficient to have permitted review on direct appeal, thereby making collateral relief unavailable pursuant to CPL § 440.10(2)(c).[4] *Id.* Third, the state contended that, "even if the record was not sufficient to permit review on direct appeal, [Bennett] could have caused such facts to appear on the record," and his claim should therefore fail under CPL § 440.10(3)(a).[5] JA 130. Fourth, the state claimed that "even if this is a purely off-the-record claim, it is still procedurally barred because [Bennett] could have raised this issue in his original 440 motion, but unjustifiably failed to do so," thereby subjecting the claim to denial pursuant to CPL

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[4] CPL § 440.10(2)(c) provides that, "Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when: . . . (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him[.]"

[5] CPL § 440.10(3)(a) provides, in relevant part, that, "Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when: (a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal."

§ 440.10(3)(c).[6] *Id.* Finally, the state set forth a defense on the merits. *See* JA 130-131. In his *pro se* response to the state's opposition, Bennett again indicated his intent to pursue federal habeas corpus relief following the exhaustion of state court remedies. *See* JA 139 (citing "Title 28 USC § 2254(b)"); JA 141 (referring to "the reviewing Federal District Court").

On November 30, 1995, the trial court denied Bennett's motion in a four word oral decision: "The motion is denied." JA 143. As the state acknowledges in its brief, despite Bennett's repeated written requests, a written version of the court's decision has never been served on Bennett, rendering him unable to seek leave to appeal. *See* Pet. Brf. 4; *see also* N.Y. Ct. Rules § 670.12(b)(1) & (b)(2)(vi).[7]

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[6] CPL § 440.10(3)(c) provides that, "Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when: . . . (c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so."

[7] In a ruling not challenged by the state in this proceeding, the Second Circuit held that Bennett's 1995 application "was and is still 'pending' in the New York courts for purposes of the AEDPA tolling provision." *Bennett v. Artuz*, 199 F.3d 116, 120 (2nd Cir. 1999). The claims presented in the federal habeas petition at issue in this case are therefore unexhausted.

Federal Habeas Corpus Proceedings

District Court

On February 11, 1998, Bennett filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He raised three claims: (i) that he was deprived of his right to a fair trial, to present witnesses in his defense, and to confront witnesses, as a result of the trial court's preclusion of Mahamed's testimony; (2) that his absence from the *Sandoval* hearing violated his right to due process; and, (3) that he was deprived of his right to effective assistance of counsel as a result of his trial attorney's failure to object to improper remarks made by the prosecutor during summation. *See* Appendix to Second Circuit Brief of Appellant (hereinafter "Sec. Cir. App.") at A10-A11

Two weeks later, on February 25, 1998, the district court dismissed the petition *sua sponte*. The court's order of dismissal relied exclusively on then-prevailing Second Circuit precedent permitting dismissal of habeas petitions in cases that became final prior to the AEDPA's effective date if they had not been filed within "a reasonable time." Sec. Cir. App. at 17-18 (citing *Peterson v. Demskie*, 107 F.3d 92 (2nd Cir. 1997)).[8]

Noting that Bennett's petition was filed "one year and nine months after the effective date of AEDPA and

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[8] *Peterson*'s "reasonable time" standard was subsequently clarified in *Ross v. Artuz*, 150 F.3d 97, 103 (2nd Cir. 1998), to afford prisoners whose convictions became final prior to the AEDPA's effective date one full year in which to file a petition for federal habeas corpus relief.

more than ten years after his conviction became final," the court found the petition "clearly untimely under *Peterson*." Sec. Cir. App. at 18.

Second Circuit

The Second Circuit reversed the judgment of the district court. Assuming the truth of Bennett's representations concerning the state court's failure to serve him with a written order denying his 1995 post-conviction relief application, the court of appeals held, in relevant part, that Bennett's 1995 application "was and is still 'pending' in the New York courts for purposes of [§ 2244(d)(2)]," and therefore, "the one-year grace period he has to file his petition under *Ross* [*v. Artuz, supra*] has not yet commenced." *Bennett v. Artuz*, 199 F.3d 116, 120-121 (2nd Cir. 1999). The court of appeals further rejected the state's contention that Bennett's 1995 application was not "properly filed" within the meaning of § 2244(d)(2) because the claims it contained "were 'subject to a mandatory procedural bar under state law.' " *Id.* at 121. The court explained that "[d]etermining whether a pending-state-court motion is procedurally barred . . . is beyond the appropriate role of a federal court in addressing whether a state post-conviction application was properly filed." *Id.* at 122. The court further observed that, "[h]ad Congress 'intended to condition tolling on a state court finding of merit, it could have drafted § 2244(d)(2) to exclude frivolous petitions . . . [and to] clearly withh[o]ld tolling from prisoners filing . . . procedurally barred claims.' " *Id.* (quoting *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999)) (all but first modification by court of appeals). Finally, after rejecting the state's argument

that a narrow construction of "properly filed" would generate "a 'paper flow' by state prisoners" attempting to extend their federal habeas filing dates, *id.* at 122, the court adopted the straightforward rule that § 2244(d)(2)'s "properly filed" requirement is satisfied when "an application for state post-conviction relief recognized as such under governing state procedures has been filed." *Id.* at 123.

SUMMARY OF ARGUMENT

Under the plain language of § 2244(d)(2), a "properly filed application" for state post-conviction review is exactly that: an application that satisfies the state's filing requirements. This rule is both workable and true to the statutory language. Adhering to § 2244(d)(2)'s focus on the filing status of a prisoner's "application," rather than on the eligibility for merits review of individual claims contained within that application, minimizes and simplifies the review a federal court must undertake to determine the timeliness of a habeas petition. This understanding of "properly filed application" poses no legitimate threat to states' interest in expediting post-conviction litigation; it does nothing to lessen non-capital prisoners' incentives to seek speedy resolution of their claims for relief, nor does it deprive the states of the mechanisms they have long employed to force death-sentenced prisoners to proceed through the capital appeals process.

The state's proposed rule – that an application for post-conviction relief is not "properly filed" within the

meaning of § 2244(d)(2) if it is "mandatorily procedurally barred under state law" – is unfaithful to the statutory language, casually converting "properly filed application" into "application raising claims that are not procedurally barred." It is also unworkable in that it affords prisoners no meaningful guidance as to when a state application for collateral relief will trigger tolling under § 2244(d)(2), and requires federal habeas courts to undertake a complex analysis of the state court record, the governing state court rules of procedure, and the merits of the underlying case merely to answer the threshold question whether a habeas petition is timely.

The state's proposed rule would spawn widespread confusion and increased costs to the judiciary. Prisoners seeking to minimize the risk of untimeliness would file federal habeas petitions containing unexhausted claims, thereby placing federal habeas courts in the position of deciding in the first instance whether a state court would be likely to consider those claims on the merits. Moreover, giving meaning to the state's rule and its exceptions would require the development of an entirely new and complex area of federal habeas corpus doctrine. The net result of the state's mandatory procedural bar rule would be to increase the work loads of state and federal judges with no corresponding benefits, not even to the states.

Finally, even under the state's proposed rule, Bennett's 1995 application for state post-conviction relief must be deemed "properly filed." Under New York law, each of the procedural defenses the state raised to Bennett's claims required the state post-conviction court to make one or more substantive determinations before being authorized to deny Bennett's application. This,

combined with the fact that the state also defended against Bennett's claims in part on the merits, makes it impossible to conclude from the state court's four-word oral denial of Bennett's application that his claims were "mandatorily procedurally barred" under New York law.

ARGUMENT

A. Introduction.

Every year, thousands of state prisoners seek collateral review of their convictions. Due to the exhaustion requirement, most inmates first pursue state post-conviction remedies. Many of these individuals, however, will eventually file a federal petition for writ of habeas corpus. Because AEDPA's new statute of limitations requires that most federal petitions be filed within one year of the petitioner's conviction becoming final on direct review, subject to a tolling provision for "properly filed applications" for state post-conviction review, prisoners who are contemplating seeking federal habeas review will inevitably ask the following question: what is a "properly filed application"? Without knowing the answer to that basic question, they will be uncertain as to when they must file in federal court in order to satisfy the statute of limitations. Thus, the impact of the Court's decision in this case will be far reaching, and it is essential to the orderly administration of justice that the Court announce a precise, workable rule that is understandable to *pro se* inmates, to counsel, and to federal judges. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985) ("the legislative purpose to create an effective remedy [through § 1983]

for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters"); *see also Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150 (1987) (quoting *Wilson*, 471 U.S. at 272) ("a uniform statute of limitations is required [in RICO context] to avoid intolerable 'uncertainty and time-consuming litigation' "). Fortunately, a clear-cut, easily administrable rule is evident from the statutory language.

B. The plain language of § 2244(d)(2) permits tolling of the limitations period during the pendency of any state application satisfying the prerequisites that must be met before a state court will allow the application to be filed.

The state's brief foregoes any meaningful analysis of the statutory language in favor of a generalized discussion of Congress' intent to accelerate habeas corpus litigation through the AEDPA. But this Court has made clear that "the starting point for interpreting a statute is the language of the statute itself," and that, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also* (*Michael*) *Williams v. Taylor*, 120 S.Ct. 1479, 1487 (2000) *citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("We start, as always, with the language of the statute").

This case turns on the meaning of § 2244(d)(2)'s phrase, "properly filed application." "[W]hen construed

in the relevant context,"[9] § 2244(d)(2)'s "properly filed" clause functions as the modifier for "one grammatical subject," the word "application." *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 79-80 (1991). Because "words and people are known by their companions," *Gutierrez v. Ada*, 120 S.Ct. 740, 744 (2000), ascertaining the meaning of the modifier "properly filed," requires first that its subject, "application," be defined.

While § 2244(d)(2) does not expressly define "application," other subdivisions of § 2244 provide clear evidence of Congress' understanding of this term. *See Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), ("Statutory language must be read in context"); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (a word in a statute "gathers meaning from the words around it"). Specifically, § 2244(b)(1) and (2) refer to "[a] claim presented in a . . . habeas corpus application," indicating that Congress defines an "application" as a document or pleading "in" which a "claim" is "presented" to a court for collateral review. *See also* § 2244(b)(4) ("any claim presented in a[n] . . . application").[10] Because "nothing in the structure

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[9] The full text of § 2244(d)(2) provides as follows: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

[10] This definition is equally applicable to words such as "petition" and "motion," which are often used interchangeably with "application." *Compare, e.g.*, 28 U.S.C. § 2262(b)(1) ("a habeas corpus application under section 2254") *with* § 2262(b)(3) ("a habeas corpus petition under section 2254"); *compare*

or purpose of [§ 2244(b) and (d)] suggests a reason for interpreting these adjacent subsections differently," *Barnhill v. Johnson*, 503 U.S. 393, 406 (1992), it is appropriate to apply the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning," *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Applying this rule of statutory construction, "application," as it is used in § 2244(d)(2), refers simply to the document in which a state prisoner sets forth his claims for post-conviction relief.

Neither the text of the AEDPA nor its legislative history offer any express indication of when a document – or, in the terms of § 2244(d)(2), an "application" – should be deemed "filed," properly or otherwise. However, "[w]here Congress uses terms that have accumulated settled meaning . . . a court must infer . . . that Congress means to incorporate the established meanings of these terms." *N.L.R.B. v. Amax Coal Co., a Division of Amax, Inc.*, 453 U.S. 322, 329 (1981). Outside of AEDPA, the meaning of the term "filed" is well established. In *United States v. Lombardo*, 241 U.S. 73 (1916), for example, this Court held that "[a] paper is filed when it is delivered to the proper official and by him received and filed." *Lombardo*, 241 U.S. at 76 (citations omitted). Numerous lower federal courts and state courts have adopted similar definitions. *See, e.g., Milton v. United States*, 105 F.2d

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§ 2263(b)(2) ("petition for post-conviction review or other collateral relief") *with* § 2244(d)(2) ("application for State post-conviction or other collateral review"); *see* § 2255 ("a motion under this section").

253, 255 (5th Cir. 1939) ("The word 'filed' . . . requires of one filing a suit, merely the depositing of the instrument with the custodian for the purpose of being filed"); *Greeson v. Sherman*, 265 F.Supp. 340, 342 (W.D.Va. 1967) (a pleading is filed when it "is delivered to an officer of the court who is authorized to receive it"); *Poetz v. Mix*, 81 A.2d 741, 743 (N.J. 1951) ("In contemplation of law, a paper or pleading is considered as filed when delivered to the proper custodian and received by him to be kept on file").[11] Likewise, most state rules of court contain analogous definitions. *See, e.g.*, 16 Ariz. Rev. Stat. Ann. Rules of Civil Procedure, Rule 5(h) ("The filing of pleadings and other papers with the court as required by these Rules shall be made by filing them with the clerk of the court . . . "); Colorado Rules of Civil Procedure, Rule 5(e) ("Filing With Court Defined. The filing of pleadings and other papers with the court as required by these rules

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[11] *See also, e.g., Freeman v. Giacomo Costa Fu Andrea*, 282 F.Supp. 525, 527 (E.D.Pa. 1968) ("it is settled law that delivery of a pleading to a proper official is sufficient to constitute filing thereof"); *Bituminous Casualty Corp. v. Clements*, 3 So.2d 865, 866 (Fla. 1941) ("Filing a pleading under the modern practice consists simply in placing it in the hands of the proper officer, to be preserved and kept by him in his official custody, as a public record. It is deemed filed when, for that purpose, it is delivered to, and received by, the proper officer who is ordinarily the clerk of court for the county in which the action was brought") (internal citations omitted); *Boland v. Heck*, 65 P.2d 1213, 1214 (Okla. 1937) ("A pleading is 'filed,' within the meaning of the statute, when it is delivered to the court clerk for that purpose . . . ") (internal citations omitted); *People v. Madigan*, 193 N.W. 806, 807 (Mich. 1923) ("It is a well-recognized general rule that a paper or document is filed . . . when it is delivered to and received by the proper officer to be kept on file").

shall be made by filing them with the clerk of the court . . . "); Michigan Court Rules (1985), Rule 2.107(G) ("Filing With Court Defined. The filing of pleadings and other papers with the court as required by these rules must be with the court clerk . . . "); New York CPLR § 304 ("filing shall mean the delivery of the summons with notice, summons and complaint, notice of petition or order to show cause to the clerk of the court in the county in which the action or special proceeding is brought . . . ").

With the meaning of "filed" in hand, understanding the phrase "properly filed" is straightforward. The adverb "properly" is ordinarily understood to describe the doing of an act correctly, or the accomplishment of a task according to expectations. *See* Webster's Deluxe Unabridged Dictionary 1442 (2d ed. 1979) (defining properly, *inter alia*, as "conforming to an accepted standard or to good usage; correct"); The American Heritage College Dictionary 1096 (3d ed. 1993) (defining proper, *inter alia*, as "Called for by rules or conventions; correct"). When the task to be accomplished is the filing of a document, that task is completed "properly" when the established requirements for filing – delivery of the correct document to the designated authority at the right time, *see supra* – have been met. Applying this reasoning to § 2244(d)(2), when the document to be filed is an "application" for state post-conviction relief, that application must be deemed "properly filed" when it has been delivered to the custodian designated to receive it in accordance with the rules governing its acceptance for filing.

This reading of § 2244(d)(2)'s "properly filed application" requirement is supported by nearly all of the federal courts of appeals that have addressed the question. In *Lovasz v. Vaughn*, 134 F.3d 146 (3rd Cir. 1998), for example, the Third Circuit held that "a 'properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing," and that, "[i]f a petitioner complies with these procedural requirements, or other procedural requirements the state imposes, his petition, even a second or successive petition, is 'a properly filed application' for purposes of § 2244(d)(2)." *Lovasz*, 134 F.3d at 148. In addition to the Second Circuit's decision in this case, the Fourth, Fifth, Ninth, and Tenth Circuits have taken similar positions. *See McSheffrey v. Angelone*, No. 98-6519, 1999 WL 89403 at *2 (4th Cir. February 23, 1999) ("a state application is properly filed if it complies with the state procedural requirements for successive collateral attacks on a conviction, such as timeliness and proper place of filing"); *Villegas v. Johnson*, 184 F.3d 467, 473 (5th Cir. 1999) ("a 'properly filed application' for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements"); *id.* at 473 n.2 (defining "procedural filing requirements" as "those prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review"); *Dictado v. Ducharme*, 189 F.3d 889, 892 (9th Cir. 1999) (holding that " 'a properly filed application' [is] an application submitted in compliance with the procedural laws of the state in which the application was filed," but that state petition at issue was not properly filed due to noncompliance with state's "rules governing

the time of filing"); *Hoggro v. Boone*, 150 F.3d 1223, 1226 n. 4 (10th Cir. 1998) (untimely appeal of denial of state post-conviction relief not "properly filed").[12]

In addition to its faithfulness to the statutory language, this understanding of § 2244(d)(2) is both clear and workable. By looking only to hard and fast, non-discretionary state filing requirements, the rule Bennett proposes simplifies the state law inquiry that a federal court must undertake in making the threshold timeliness determination. The rule's clarity and ease of application also make it accessible and understandable to all litigants, thereby minimizing the likelihood that petitioners will

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[12] The Eleventh Circuit is the only court of appeals to have taken a contrary position. In *Weekley v. Moore*, 204 F.3d 1083 (11th Cir. 2000), a divided panel found the petitioner's state post-conviction application not "properly filed" because it was successive. In reaching this result, however, the panel majority undertook virtually no analysis of the statutory language, relying instead on a mischaracterization of the Ninth Circuit's decision in *Dictado v. Ducharme*, *supra*, and on the Seventh Circuit's inapposite decision in *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1998) (application for leave to file successive state habeas petition not a "properly filed application" for purposes of § 2244(d)(2)). *Weekley*, 204 F.3d at 1085-1086. A different panel of the Eleventh Circuit and a panel of the Ninth Circuit have also concluded that post-conviction applications which are untimely under a state's limitations period are not "properly filed" within the meaning of § 2244(d)(2). *Webster v. Moore*, 199 F.3d 1256, 1258 (11th Cir. 2000) (third state petition, "which the state trial court dismissed as procedurally barred by the two-year [state] statute of limitations . . . , was not 'properly filed' within the meaning of § 2244(d)(2)"); *Dictado*, 189 F.3d at 892 (state petition that "did not comply with Washington's rules governing the time of filing . . . was not 'properly filed' ").

bypass potentially available state remedies for fear of unwittingly squandering their time under the federal limitations period.[13] This in turn preserves and furthers the

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[13] Some courts of appeals have recognized that sometimes judges, as opposed to non-judicial court personnel, determine whether or not documents will be accepted for filing. Under such a formulation, an application for state post-conviction relief is "properly filed" if it satisfies the prerequisites that must be met before a state court will allow it to be filed and accorded review beyond the essentially ministerial determination whether the applicant has satisfied clearly-defined, non-discretionary state court filing requirements. The Fifth Circuit's recent decision in *Williams v. Cain*, 217 F.3d 303 (5th Cir. 2000), illustrates this rule. In *Williams*, the Fifth Circuit rejected the petitioner's claim of entitlement to tolling for the time during which his untimely application for a supervisory writ to review the denial of state post-conviction relief remained before the Louisiana Supreme Court. Distinguishing the case from *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999), in which a successive Texas state habeas petition was held to be "properly filed," and *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000), in which an untimely Louisiana application for post-conviction relief was deemed "properly filed," the court explained that, in those cases,

> the state court had to make a determination on issues related to the substance of the state applications to determine whether the applications fell within a clearly-defined exception to the time requirements. In this case, by contrast, the question whether a state application . . . for a supervisory writ is timely filed under [the governing state court rule] requires no examination relating to the merits. There was no question that the state application filed here was untimely under state law. The Louisiana Supreme Court did not need to make any determination related to the merits to reach this decision.

Williams, 217 F.3d at 309.

fundamental requirement that, in the interests of federalism and comity, state courts be given the first opportunity to pass on the merits of a prisoner's constitutional claims. *See* § 2254(b) and (c); *see also O'Sullivan v. Boerckel*, 119 S.Ct. 1194 (1999); *Rose v. Lundy*, 455 U.S. 509 (1982).

The state's brief contains several unsupported assertions that the rule Bennett proposes will "thoroughly undermine" or "contravene[ ] the obvious purposes of [§ 2244(d)]." Pet. Br. 30. The first argument is that unless this Court adopts the state's understanding of § 2244(d)(2), prisoners will file countless state petitions in order to extend the federal limitations period. *See* Pet. Br. 37. But non-capital prisoners have no incentive, regardless of the existence of a limitations period, to delay adjudication of their claims for relief, and there is simply no evidence suggesting that a construction of "properly filed application" that is faithful to the statutory language will somehow motivate these prisoners to file abusive applications. *See Rose v. Lundy*, 455 U.S. 509, 520 (1982) ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims"). As for the truly vexatious litigants, they will continue to file in state and federal court without regard to the rules, just as this small handful of prisoners now file procedurally barred claims, and abusive petitions. No construction of "properly filed application" will dissuade them from doing so.

The state's brief also suggests that death-sentenced inmates must be prohibited from repeated filings designed to cheat the executioner. *See* Pet. Br. 36-37. But there is no evidence that death-sentenced prisoners are filing repetitive state applications for the purpose of extending § 2244(d)'s limitations period. In fact, there is

not a single reported decision in which a capital prisoner has attempted to do so, even in the circuits that have had the "time and place of filing" construction of "properly filed application" in place for a substantial period of time. Furthermore, both before and since passage of AEDPA, states have utilized a number of methods to force death-sentenced inmates to proceed through the capital appeals process. Some states, for example, have established strict time limitations of their own, *see, e.g.*, Va. Code § 8.10-654.1 (sixty day limitations period for filing of state habeas petitions in capital cases). Many states employ the straightforward method of setting execution dates to force capital prisoners to initiate federal habeas corpus proceedings in order to obtain a stay of execution. *See In re Stays of Execution in Capital Cases*, 471 S.E.2d 140 (S.C. 1996). Nothing in the rule Bennett proposes would impair the states' ability to utilize these or any other methods to accelerate collateral review in capital cases,[14] and the state's "the sky is falling" arguments provide this Court no legitimate justification for departing from the plain meaning of § 2244(d)(2)'s words. *See Slack v. McDaniel*, 120 S.Ct. 1595, 1606 (2000) ("We reject the State's argument that refusing to give a new meaning to the established term 'second or successive' opens the

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[14] For example, many states use a procedure modeled on Rule 4 of the Rules Governing § 2254 Cases whereby post-conviction petitions are promptly routed to an assignment judge for preliminary screening and, if warranted, summary dismissal. Additionally, in some states, post-conviction petitioners whose repetitive filings have been established to be meritless and abusive are simply barred from filing new challenges.

door to the abuses described"). And, as this Court recognized in *Slack*, in the unlikely event that capital prisoners were to identify a means of exploiting the rule prescribed by the statute, "the State[s] remain[ ] free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings." *Id.*

C. Because Bennett's 1995 application satisfied New York's filing requirements, it was and remains "a properly filed application for State post-conviction . . . review."

New York law has no specific requirements for the filing of a Motion to Vacate Judgment pursuant to CPL §§ 440.10 or 440.30. But New York law does provide a clear, unambiguous definition of "filed." For example, § 304 of the New York Civil Practice Law and Rules, entitled "Method of commencing action or special proceeding," provides that "filing shall mean the delivery of the summons with notice, summons and complaint, notice of petition or order to show cause to the clerk of the court in the county in which the action or special proceeding is brought. . . . " Similarly, § 202.5 of the Uniform Rules for the New York State Trial Courts, entitled "Papers Filed in Court," provides that "[a]ll papers for . . . consideration of the court shall be presented to the clerk of the trial court in the appropriate courtroom or clerk's office . . . , except that where the clerk is unavailable or the judge so directs, papers may be submitted to the judge and a copy filed with the clerk at the first available opportunity." N.Y. Ct. Rules § 202.5(b) (subtitled "Submission of papers to judge"). New York decisional law also adheres to the commonly understood

meaning of "filing." *See, e.g., Application of Bd. of Sup'rs of Chenango County for Appointment of Com'rs of Appraisal in Condemnation Proceeding*, 261 N.Y.S. 76, 84 (N.Y.Co.Ct. 1932) (following the "general trend of judicial decisions," described as being "to the effect that the delivery of a paper to an official, for the purposes of safe-keeping and as a public record, constitutes the act of 'filing' "); *see also id. quoting, inter alia, United States v. Lombardo*, 241 U. S. 73, 76 (1916); *Matter of Norton*, 53 N. Y. S. 924 (N.Y.Co.Ct. 1898).

It is undisputed that Bennett complied with New York's requirements for properly filing his 1995 application. There has never been any suggestion, either before this Court or during the proceedings in the lower courts, that Bennett failed to deliver his application to the correct custodian, or that the state court declined to accept the application for filing. The Second Circuit was therefore correct to conclude that Bennett's 1995 application was a "properly filed application" within the meaning of § 2244(d)(2). Furthermore, because that application has yet to be decided in the manner prescribed by New York law, Bennett's time for filing his petition for federal habeas corpus relief has not begun to run. In short, it was – and remains – a properly filed application for state post-conviction review.

D. The availability of tolling under 28 U.S.C. § 2244(d)(2) does not depend on the procedural default status of the individual claims presented in a prisoner's application for post-conviction relief.

The state's brief asserts that § 2244(d)(2)'s "properly filed application" language really means "application raising claims not mandatorily procedurally barred under state law." *See* Pet. Br. 23. We will return to the issue of what it means to say "mandatorily procedurally barred" in section E., infra, but we begin by demonstrating that the state's reading of the relevant statutory language – whose origins clearly lie not in the text of the statute, but in what the state contends Congress "must have meant" – amounts to a dramatic, unsupportable redrafting of § 2244(d)(2).

The fundamental flaw in the state's rule is that it ignores Congress' use of the word "application" in the statutory text, treating it instead as a synonym for "claim." Misreading "application" in this manner is the only way to facilitate use of the procedural default doctrine as the test for whether an application is "properly filed." Procedural default is a doctrine of issue, or claim, preclusion, not a wholesale bar to the "application" in which potentially barred claims are brought before a court.[15] Thus, for the state's rule to even appear marginally workable and consistent with existing habeas law,

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[15] *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999), *citing Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991); *Engle v. Isaac*, 456 U.S. 107, 125-126, n.28 (1982) ("Boerckel's failure to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of

the distinction between "application," as Congress wrote it, and "claim," as the state reads it, must be ignored. Discounting the significance of "application" for the sake of this ill-fitting procedural default theory results in similar errors with regard to the word "filed," which the state treats as "presented," and the word "properly," to which the state attaches unwarranted and unnatural meanings.

As discussed in detail *supra* at 13-15, in the context of modern procedures for collateral review of state criminal convictions, the word "application" is commonly understood to refer to a document or written pleading in which a prisoner sets forth his claims for relief. That Congress had this definition in mind – and that it appreciated the distinction between an "application" and a "claim" – when it drafted the AEDPA is confirmed by the language of § 2244(b)(1) and (2), both of which refer to "[a] *claim* presented in a second or successive habeas corpus *application.*" (emphasis added).

Congress' understanding of the distinction between an application and a claim, and its decision to use "application," not "claim," as the subject of § 2244(d)(2)'s "properly filed" phrase, completely undermine the "mandatory procedural bar" rule advocated by the state. Claims are subject to rejection under the doctrine of procedural default, applications are not. Moreover, while

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those claims"); *Gray v. Netherland*, 518 U.S. 152, 161 (1996) ("Petitioner's failure to raise his *Brady* claim in state court implicates the requirements in habeas of exhaustion and procedural default"); *Harris v. Reed*, 489 U.S. 255, 263 (1989) ("procedural default does not bar consideration of a federal claim . . . unless . . . ").

Congress is presumed under the rules of statutory construction to be aware of this basic principle of habeas jurisprudence, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation"), reliance on that presumption here is not necessary. Congress expressly indicated its familiarity with the distinction between review on the merits and disposition on other grounds in at least two of the AEDPA's provisions: In § 2254(d), Congress imposed limits on federal courts' ability to grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings . . . " Similarly, in § 2264(a), Congress limited federal habeas review in capital cases from qualifying states to consideration of "a claim or claims that have been raised and decided on the merits in the State courts . . . " Given Congress' demonstrated awareness of the difference between a "claim" and an "application," and of the applicability of procedural default principles to the former but not the latter, the state's "mandatory procedural bar" rule simply cannot be squared with Congress' selection of "application" as the subject of § 2244(d)(2)'s "properly filed" phrase.

The discord created by ignoring the settled meaning of "application" extends to the word "filed." If the state's rule is correct, "filed" actually means "presented." But as described *supra* at 15-17, the verb "file" describes the act of delivering a document to a designated authority to be placed in the court records. When referring to the procedural default status of a habeas petitioner's claim, however, this Court has consistently spoken in terms of the claim's *presentation*. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (when prisoner has not "properly

presented his claims to the state courts . . . [he] has procedurally defaulted his claims"); *Gray v. Netherland*, 518 U.S. 152, 159 (1996) (describing allegation that petitioner's "*Brady* subclaim had not been *presented* to the state courts on direct appeal or in state habeas corpus proceedings, and was thus procedurally barred"); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (procedural default occurs when "a habeas petitioner . . . has failed to meet the State's procedural requirements for *presenting* his federal claims"); *Dugger v. Adams*, 489 U.S. 401, 419 (1989) (observing that state court "did not invoke procedural default as a basis for decision, notwithstanding the prisoner's failure to *present* his . . . claim on direct appeal") (all emphases added). Here again, Congress' grasp of the ordinary usage of the terms "filed" and "presented" is demonstrated in the AEDPA, which contains repeated references to the *filing* of *applications*, and the *presentation* of *claims*. *See, e.g.*, § 2244(b)(3)(A) ("Before a second or successive *application* permitted by this section is *filed*"); § 2263(a) ("Any *application* under this chapter for habeas corpus relief under section 2254 must be *filed* . . . "); § 2244(b)(1) ("A *claim presented* in a second or successive habeas corpus *application*"); § 2244(b)(4) ("any *claim presented* in a second or successive *application*"); § 2244(d)(1)(D) ("the factual predicate of the *claim or claims presented*"). Thus, just as with "application," Congress' selection of "filed," rather than "presented," for use in § 2244(d)(2) conclusively demonstrates that it was not speaking of procedural default.[16]

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[16] That "properly filed application" does not mean "application raising claims that are not procedurally barred" is

The state's contortions of the statutory language continue with its treatment of the adverb "properly" as an all-purpose statutory wild card, into which it reads a range of potential procedural stumbling blocks to merits review of a prisoner's claims. It is unclear from the brief whether the state seeks to exclude all applications that a state court could not "hear on the merits under state procedural rules," Pet. Br. 22, or "only" those applications containing claims "that are mandatorily procedurally barred under state law," Pet. Br. 28. Either view, however, gives content to the word "properly" that cannot be justified. *See Consumer Product Safety Commission, supra* ("[a]bsent a *clearly expressed legislative intention to the contrary,* th[e] language [of a statute] must ordinarily be regarded as conclusive") (emphasis added).

The state attempts to avoid the plain meaning of the adverb "properly" in two ways: first, by divorcing it from the verb it modifies in § 2244(d)(2), and second, by reference to a treatise and a law review article suggesting that the phrase "properly filed" is ambiguous. *See* Pet. Br. 29. Using the first method, the state concentrates on a dictionary definition of "the word 'proper' " as "ordinarily denot[ing] 'strictly accurate' or 'correct,' " and contends

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confirmed by the only federal court of appeals to have squarely addressed the question. In *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999), the Fifth Circuit observed that "Congress enacted AEDPA against a backdrop of federal habeas law dealing with procedurally barred claims. [citations omitted] . . . . That Congress nonetheless chose not to address successive state petitions or procedurally barred claims in § 2244(d)(2) convinces us all the more that we ought not assume an overly broad meaning of 'properly filed.' " *Villegas*, 184 F.3d at 470.

that a "post-conviction application that fails to comply with mandatory state procedural rules cannot" satisfy this definition. Pet. Br. 29. But this overlooks the key fact that Congress did not use the adjective "proper" to qualify the noun "application;" rather, it used the adverb "properly" to modify the verb "filed." *See* Webster's Deluxe Unabridged Dictionary 28 (2d ed. 1979) (defining "adverb" as "a word used to modify a verb, adjective, or other adverb by expressing time, place, manner, degree, cause, etc."). As discussed *supra* at 17, giving the words "properly" and "filed" their ordinary, common meaning, and reading them in the context of § 2244(d)(2)'s language, the question they combine to propound is simply whether or not the prisoner has accomplished the delivery of his application to the custodian designated to receive it in accordance with the rules governing its acceptance for filing.[17]

The state's alternative means of avoiding the plain meaning of the statutory language is to urge that "there is, at the very least, sufficient ambiguity in the term 'properly' to justify an inquiry into Congress's objectives in enacting the statutory provisions." Pet. Br. 29 (citing Liebman & Hertz, § 5.1b n.64, at 236; Tushnet & Yakle

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[17] The state's other shallow foray into the meaning of "properly" is equally misguided, this time acknowledging that Congress used "properly," not "proper," in § 2244(d)(2), but replacing "filed" with "presented." *See* Pet. Br. at 29 *citing O'Sullivan v. Boerckel*, 526 U.S. at 848; *Harris v. Reed*, 489 U.S. 255, 265 (1989) ("this Court has often used the term 'properly' in discussing the exhaustion and procedural default doctrines to refer to claims presented to state courts in accordance with state procedural rules").

[sic] at 30). But merely asserting that a word is ambiguous does not make it so, and the state's complete failure even to attempt an analysis of the language of § 2244(d)(2) using the methods this Court has established renders its assertion hollow.

More importantly, as we have demonstrated, straightforward application of this Court's rules of statutory construction reveals no genuine ambiguity in what Congress meant by the phrase "properly filed." Resorting to the generalized arguments on legislative intent that occupy the majority of the state's brief is therefore unnecessary. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 116 (1993) (Thomas, J., joined by O'Connor and Kennedy, JJ., dissenting) ("there is no need to resort to such general understandings of the policy behind a statute when the language suggests a contrary meaning"); *cf Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 446 (1972) ("If the language of a statute is clear and unambiguous there is no occasion to resort to legislative history. Nor can such history, however illuminating it may seem, be relied upon to contradict, or dilute, or add unspecified conditions to statutory language which is perfectly clear"); *United States v. Oregon*, 366 U.S. 643, 648 (1961) ("Having concluded that the provisions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act").

Reading "properly," as the state does, to mean "presenting claims eligible for merits review under state law" also ignores the fact that when Congress wanted to limit federal habeas review to claims that received merits review in the state courts, it did so expressly. In § 2254(d),

for example, Congress spoke specifically about "any claim that was adjudicated on the merits in State court proceedings . . . " Congress spoke with equal clarity in § 2264(a), establishing that, in a qualifying capital case, "the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts . . . " Given Congress' demonstrated ability to draft statutory language focusing on claims that received merits review in state court proceedings, its failure to use such language in § 2244(d)(2) cannot be ignored in favor what the state contends Congress must have meant. *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 111 S.Ct. 840, 846-47 (1991), *quoting Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300 (1983) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ") (internal quotation marks omitted); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 305-306 (1993) (Thomas, J., dissenting, joined by Blackmun and O'Connor, JJ.) ("Courts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do").

E. Defining "properly filed application" as "application raising claims that are not 'mandatorily procedurally barred' " affords prisoners no meaningful guidance as to the types of claims that will result in tolling under § 2244(d)(2).

Even if the statutory language could support the state's "mandatory procedural bar" standard, that

standard would still be totally unworkable. The state's brief never explains what "mandatory procedural bar" means, undoubtedly because trying to do so would demonstrate the inherent problems with the suggested rule. First, there are, in fact, virtually no mandatory procedural bars. Virtually all state procedural default rules contain exceptions of some sort – *e.g.*, fundamental or plain error, cause and prejudice, miscarriage of justice, state interference, ineffective assistance of counsel, retroactive new law, newly discovered evidence – and are therefore not "mandatory." And the few barriers to state post-conviction review that are genuinely "mandatory," such as a lack of jurisdiction to entertain a prisoner's claims, or a court order barring a vexatious litigant from filing new challenges, are not true "procedural bars." Thus, if read literally, the rule would apply to almost no one.

An examination of the state's brief reveals that, despite the talismanic invocation of "mandatory procedural bar," the state is in fact suggesting that an application is not "properly filed" if it contains procedurally defaulted claims. But even using this standard, the reality is that the overwhelming majority of prisoners would fit within the state's own exceptions. According to the state's brief, "[i]f a petitioner colorably invokes an exception to the state's procedural bar, or if the state courts regularly overlook the procedural bar in order to review claims such as the petitioner's, the ambiguity should be resolved in favor of the petitioner." Pet. Br. 32; *see also* Pet. Br. 34 ("Any legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling"). It is the rare case in which a prisoner does not "colorably invoke" an exception to a state's procedural bar defenses.

While the porousness of the state's rule would be attractive to many habeas petitioners, chaos would be the inevitable result. Prisoners uncertain whether their claims may be deemed procedurally barred, or whether a state court would find their arguments in support of merits review "colorable," would bypass state collateral review out of a legitimate fear that the time spent in state court would not toll the limitations period if their claims are deemed procedurally barred. The state's brief suggests that the solution to this problem is simply to rely on federal district courts to dismiss petitions which are arguably unexhausted, which would in turn "assure[ ] [the petitioner] that he or she will obtain the benefit of tolling because there will already be a determination on the facts of petitioner's case that the state proceeding is necessary for exhaustion . . . " Pet. Br. 35. But that is no answer. Such a scheme would invert the exhaustion requirement by putting federal courts in the position of having to decide in the first instance whether a state court would consider a claim on the merits without the benefit of any type of state court order addressing the issue. Furthermore, it would go directly against the obvious purpose of § 2254(b), and would flout this Court's "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Rose v. Lundy*, 455 U.S. 509, 520 (1982); *see also id.* at 518-519 ("A rigorously enforced total exhaustion rule will encourage state prisoners to *seek full relief first from the state courts*, thus giving those courts the *first* opportunity to review all claims . . . ") (emphasis added). It is also

impossible to conceive of how such a backtracking system could possibly serve the state's interest in eliminating "repetitious litigation that . . . causes years of delay." Pet. Br. 37.

In addition to leaving prisoners to anxiously "wait and see" whether the state courts will reach the merits of their claims, or at least find their arguments for doing so "colorable," the state's formulation raises, but does not answer, a host of other troubling questions. For example:

- What differentiates a "mandatory procedural bar" from a non-mandatory procedural bar?
- What constitutes an "arguably legitimate attempt to exhaust state remedies"?
- What constitutes a "colorable" invocation of an exception to a state procedural bar?
- What proportion of the claims presented in a state court application must be colorably eligible for merits review in order to qualify as "properly filed"? Is a single non-barred claim enough?
- Should a state application raising procedurally barred claims nevertheless be deemed "properly filed" if, after the state raises procedural bar as an affirmative defense, the applicant comes forward with a colorable argument that one or more of his claims fits within an exception to the bar? If so, does tolling under § 2244(d)(2) begin at the time the applicant's response is filed, or should it relate back to the filing of the initial application?
- To accommodate the fact that procedural default is assessed claim-by-claim, should

"properly filed," and therefore tolling under § 2244(d)(2), also be measured claim-by-claim, notwithstanding the statute's express reference to the filing status of the "application"?

- If tolling under § 2244(d)(2) is to be measured claim-by-claim, will a prisoner be required to file a federal habeas petition raising direct appeal claims if his state collateral proceedings extend beyond one year of the date on which his direct appeal becomes final?

- If tolling under § 2244(d)(2) is to be measured claim-by-claim, must the limitations period be calculated separately for claims included in a state application by way of amendment subsequent to the filing of the initial application?

- Do federal district courts have the authority, for purposes of determining the timeliness of a habeas corpus petition, to take a fresh look at a state court's finding that a claim was procedurally barred from state collateral review, or must they take the state court's determination at face value?

- If a petitioner whose claim was found to be procedurally defaulted by a state court is nevertheless able to establish cause and prejudice or a miscarriage of justice in federal court, would the petitioner still be deprived of tolling under § 2244(d)(2)?

In short, the state's proposed rule would create an entirely new and complex field of habeas corpus doctrine, which would undoubtedly require this Court to revisit

§ 2244(d)(2) repeatedly in the future. In the meantime, the federal courts would remain paradoxically mired in confusing, inefficient and unnecessary case-by-case litigation over the operation of a single statutory provision whose purpose was to accelerate, not complicate, collateral challenges to state court convictions. *Cf Wilson v. Garcia*, 471 U.S. 261, 272 (1985) ("The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983"). This is clearly not what Congress intended. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available")

F. The claims in Bennett's 1995 application were not "mandatorily procedurally barred" under New York law, and Bennett is therefore entitled to tolling even under the state's construction of § 2244(d)(2).

Bennett's 1995 state court application presented three claims for relief: that his rights were violated when the trial court prevented him from calling a witness in his defense; that the prosecutor committed misconduct; and that his right to be present at all material stages of trial

was violated.[18] The only evidence of how the state post-conviction court resolved these claims is its four-word oral ruling: "The motion is denied." JA 143. It is impossible to ascertain from that ruling which of the state's procedural and substantive defenses, if any, the state court relied upon to deny relief. Clearly, this would not qualify as a procedural default holding under any of this Court's decisions. *See Coleman v. Thompson*, 501 U.S. 722 (1991) ("[state] court's explicit grant of a dismissal motion based solely on procedural grounds" justified reading summary state court order as establishing procedural default); *Harris v. Reed*, 489 U.S. 255, 263 (1989) ("a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar").

None of the procedural grounds on which the state defended against Bennett's claims is "mandatory," in the sense of requiring automatic dismissal without substantive consideration. In opposition to Bennett's first two claims – preclusion of defense testimony and prosecutorial misconduct – the state relied in part on CPL § 440.10(2)(a), which requires denial of relief when a claim has been previously raised and decided on direct

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[18] In his 1995 application, Bennett clearly indicated that he filed the application in order to exhaust state remedies as required by § 2254(b). *See* JA 114. The state's brief does not explain why its concession that "[a]ny legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling," Pet. Br. 34, should not apply to Bennett.

appeal "*unless* since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue[.]" (emphasis added). Because the statute contains an express exception, the requirement that relief be denied cannot and does not become effective, or in the state's words, "mandatory," until the reviewing court has first determined that resolution of the claim is not governed by a retroactive change in governing law.[19] In addition to § 440.10(2)(a), the state also defended against Bennett's prosecutorial misconduct claim on the merits, arguing that Bennett "failed to establish" prejudice and citing the state appellate court's earlier finding that the trial court's erroneous preclusion of defense testimony was harmless.[20] JA 128. Here again, the

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[19] In its brief, the state faults Bennett for never having "established that there had been any retroactively effective change in the law." Pet. Br. 44; *see also id.* at n.10 (contending Bennett's less than artful pleading placed his first two claims outside the statutory exception). The state *may* be correct; but the important point for purposes of applying the state's own interpretation of § 2244(d)(2) is that whether or not Bennett sufficiently invoked § 440.10(2)(a)'s exception was a decision that the state *court* had to make after consideration of the facts and arguments presented to it. Until then, there was nothing "mandatory" about the applicability of § 440.10(2)(a)'s denial requirement.

[20] Specifically, the state argued: "Furthermore, defendant's second claim cannot possibly succeed in view of the Appellate Division's ruling on that issue because, even if the prosecutor did act in bad faith in asking for preclusion – a fact that defendant has failed to establish – that fact would only justify vacatur of defendant's conviction if it actually prejudiced defendant. Since the Appellate Division already concluded that the preclusion was harmless beyond a reasonable doubt, any claim in this motion that is based upon the preclusion of Mahamed's testimony must be summarily denied." JA 128.

state's adversarial contentions that Bennett had not alleged facts sufficient to warrant relief on the merits, and that the appellate court's finding of harmlessness on a different but related issue precluded relief, are not properly characterized as "procedural bars," "mandatory" or otherwise.[21]

The state's defenses to Bennett's third claim – that his right to be present at all material stages of the proceedings was violated – exacerbate the ambiguity in the state court's oral denial.[22] The state defended against this

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[21] The state's brief in this Court raises a new defense to Bennett's prosecutorial misconduct claim, arguing that because the "claim was based on the trial record and could have been made on [direct] appeal," and because "Bennett never sought to invoke the 'unjustifiable failure' language of [§ 440.10(2)(c)] . . . this issue too was mandatorily procedurally barred . . . " Pet. Br. 44. Apart from the fact that this defense appears nowhere in the state's response to Bennett's prosecutorial misconduct claim submitted in state court, the state's reliance on it now actually undercuts its own argument: just like subdivision (a) of § 440.10(2), subdivision (c) contains an exception – justifiable failure to raise a claim on direct appeal – that prevents automatic denial of a claim.

[22] The state's brief asserts that Bennett's third claim was based only on state law, presumably to suggest that this fact, were it correct, would somehow render that claim irrelevant to the tolling analysis under § 2244(d)(2). While the New York Court Appeals' decision in *People v. Favor*, 82 N.Y.2d 254 (N.Y. 1993), does indicate that its decision in that case and in *People v. Dokes*, 79 N.Y.2d 656 (N.Y. 1992), focused on state law, nothing in those decisions foreclosed the argument that a defendant's absence from a *Sandoval* hearing would violate the federal Constitution, as well as New York law. Furthermore, even assuming Bennett's third claim is properly characterized as being confined to state law, nothing in § 2244(d)(2) suggests

claim on five grounds; some of which were procedural, others were substantive. First, the state invoked CPL § 440.30(4)(c), and urged that the court "should" deny the claim because Bennett's allegation was "conclusively refuted by documentary proof." JA 129. But CPL § 440.30(4)(c) provides that, "Upon considering the *merits* of the motion, the court *may* deny it without conducting a hearing if: . . . (c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof[.]" (emphasis added). The plain language of the statute thus makes clear both that the post-conviction court is required to "examin[e] . . . the merits of the claim," and that, after doing so, it "may deny" relief.[23] This is not a procedural bar at all.

The state also relied on CPL § 440.10(2)(c), which prohibits collateral relief on a ground that could have been raised on direct appeal if "no such appellate review or determination occurred owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." As with

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that, in order to qualify as "properly filed," an application must contain exclusively federal constitutional claims.

[23] The significance of the distinction between "may" and "must" in the New York provisions governing a post-conviction court's authority to deny relief is not lost on the state. In its brief, the state emphasizes that "the language of the two procedural bars at issue is mandatory: the statutory bar requires that 'the court *must* deny a motion to vacate a judgment when' the conditions are met." Pet. Br. 48-49 (citation omitted) (emphasis by state). Perhaps it is for this reason that the state focuses only on the provisions that include "must," without acknowledging its reliance in state court on the provisions that say "may."

the state's other statutory defenses, this provision is not automatic or "mandatory," but instead requires a finding by the state court first that the direct appeal contained facts sufficient to permit adjudication of the claim, and second that the prisoner's failure to raise the claim on direct appeal was "unjustifiable." And while the state court may have resolved both of these issues against Bennett, whether it actually did so simply cannot be determined from its four-word oral ruling.

The state's third and fourth defenses were also based on statutory provisions that allow, but do not require, the state court to deny relief. Invoking subdivisions (a) and (c) of CPL § 440.10(3),[24] the state contended respectively that "even if the record was not sufficient to permit

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[24] CPL § 440.10(3) provides in relevant part:

> Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:
>
> (a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. . . . ; or
>
> * * *
>
> (c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

review on direct appeal, [Bennett] could have caused such facts to appear on the record," and that "even if this is a purely off-the-record claim, it is still procedurally barred because [Bennett] could have raised this issue in his original 440 motion, but unjustifiably failed to do so." Apart from the fact that the introductory sentence of CPL § 440.10(3) indicates that the court "may deny" claims meeting certain conditions, a review of the specific subdivisions relied upon by the state reveals once again that the court's discretion to deny Bennett's claims could be triggered only if it first made specific findings relating to Bennett's conduct in earlier proceedings. Subdivision (a) allows the court to deny relief only after finding that a defendant exercising "due diligence" could have "readily" caused the relevant facts to appear on the record, and that the defendant's failure to ensure inclusion of the facts was "unjustifiabl[e]." And subdivision (c) permits the court to deny relief on a second or successive application only after finding that the applicant "was in a position adequately to raise the ground or issue" in a previous application. Again, the state court may (or may not) have resolved these inquiries against Bennett. But if it did, the court did not say so, thus making it impossible to characterize Bennett's application as "mandatorily procedurally barred."

Finally, the state defended against Bennett's third claim on the merits. *See* JA 130 (Affirmation in Opposition to Defendant's Motion to Vacate Judgment: "[Bennett's] claim that his right to be present at his *Sandoval* hearing was violated . . . is meritless"). It goes without saying that if the state court relied on this argument to support its

denial of relief, it did not find Bennett's third claim "mandatorily procedurally barred."

In sum, every defense raised by the state to the claims presented in Bennett's 1995 application required some level of substantive review before the state court would have been permitted to deny relief under state law. While the state, like other litigants, may have believed its arguments to be persuasive and strong, that belief is simply not enough to make the state's arguments dispositive of the case. Because the state court was required by unambiguous state law to make specific findings with respect to the substance of each of the state's defenses, it cannot legitimately be said that the claims in Bennett's 1995 application were "mandatorily procedurally barred."

CONCLUSION

The decision of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

TONY BRUCE BENNETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

RESPONDENT'S INTERPRETATION OF SECTION 2244(D) NEGATES THE PLAIN LANGUAGE OF THE STATUTE AND SUBVERTS CONGRESS'S INTENT IN PASSING THE STATUTE OF LIMITATIONS.

In his brief, respondent Bennett does not dispute many of the state's contentions. He does not dispute that the purpose of the tolling provision is to allow for exhaustion of state remedies, or that state petitions that are procedurally barred and cannot be adjudicated on the merits do nothing to advance exhaustion. Similarly, respondent does not dispute that giving effect to state procedural bars would advance principles of comity and federalism that pervade habeas corpus jurisprudence and were at the core of Congress's concerns in enacting AEDPA. And, perhaps most significantly, he does not dispute the fact that, although Congress sought to end what it perceived to be intolerable delays, particularly in death penalty cases, his interpretation would provide capital and non-capital prisoners alike with a simple expedient to perpetuate those delays. Respondent, nonetheless, raises four arguments in support of affirmance. None of these possesses any merit.

A. Respondent's Interpretation Negates the Plain Language of the Tolling Provision.

Respondent contends that a state post-conviction petition that is filed in a court that cannot determine the merits of the petition due to the state's procedural rules may still be "properly filed" in that court for purposes of the tolling provision. He argues that the wording of the statute mandates this result and that the plain language of the provision is so clear and unambiguous that any examination of the purposes of the statute of limitations, or even of the tolling provision that he invokes, is prohibited. But respondent's definition of the statutory language is flawed for many reasons, and his attempt

to preclude the court from examining the purposes of the statutory provision must fail.

First, respondent's plain language interpretation is flawed because it fails to give effect to all the words of the tolling provision. Respondent advocates a rule that a state post-conviction application is "properly filed" when a defendant has "satisf[ied] the prerequisites that must be met before a state court will allow the application to be filed." Resp. Bf. at 13. But any application that has been accepted for filing has, of course, "satisf[ied] the prerequisites that must be met before a state court will allow the application to be filed." This formulation, while simple enough on its face, fails to indicate how "properly filed" is distinct from just "filed." The failure to ascribe any separate meaning to the word "properly" is a "critical misstep," in the words of this Court, that establishes that his interpretation cannot be correct. *See Williams v. Taylor*, 120 S.Ct. 1495, 1519 (2000).

Second, respondent's rule calls into question Congress's use of the word "filed" in many other places in AEDPA where Congress used that term alone to mean what respondent defines as "properly filed." Thus, when Congress referred to "proceedings filed under section 2254" (§2262(a)), and to applications "filed" in federal court (§§2244(b)(3)(D), 2266(b)(1)(a), 2266(c)(1)), it obviously assumed that those applications had been filed in compliance with the rules necessary to permit the filing to occur. *See also* §2246 (referring to respondent's right to "file answering affidavits").

And when Congress – in enacting the most closely analogous provision of AEDPA, the statute of limitations under the "opt-in" provisions for capital cases – referred to the filing of motions for an extension of time (§2263(b)(3)), or the filing of petitions for certiorari (§2263(b)(1), §2262(a)), it undoubtedly meant documents that complied with the

prerequisites that were necessary for the document to be accepted for filing. Most significantly, when Congress used the word "filed," without the modifier "properly," in the parallel tolling provision under AEDPA's "opt-in" statute of limitations to suspend the limitations period during the pendency of a first state post-conviction application, there too it necessarily assumed that the documents complied with the rudimentary prerequisites necessary to allow filing in the first place.

Indeed, had Congress intended to permit tolling for any document that complied with the prerequisites for filing, it could have simply used the word "filed," as it did in allowing tolling for the first post-conviction application under the "opt-in" statute of limitations. The fact that it declined to do so is evidence that Congress meant to accomplish more by "properly filed" than what it could have accomplished by simply using "filed."

Moreover, Congress could, in fact, have accomplished the purpose that respondent ascribes to "properly filed" without using that phrase at all. It could simply have permitted tolling for the "time during which [an] . . . application for post-conviction review . . . is pending." Because an application that is "pending" must have been "filed," this language would have sufficed to allow tolling for all state post-conviction applications that had complied with sufficient prerequisites to allow filing. But Congress, instead, specifically added the qualifying language that the prisoner's petition be "properly filed" in state court, and, of course, must be presumed to have done so for a reason.

Third, contrary to respondent's suggestion, his rule cannot be easily applied and raises as many questions as it answers. Respondent acknowledges that his rule requires a determination of whether the "correct document" is delivered to the "designated authority" at the "right time." Resp. Bf. at 17. But the rule provides no guidance whatsoever on what

constitutes the "correct document," who performs the review to make that determination, how the determination is made, or whether the determination is in any way related to pre-existing habeas doctrine or case law. Indeed, while the question of what constitutes the correct document is indeed the key inquiry, respondent, by using the term without any further explanation, simply assumes a known answer when there is none.

Similarly, respondent provides little guidance on what constitutes a "designated authority." By this reference, he presumably means the "appropriate court," as several decisions to which he cites have held. *See* Resp. Bf. at 18. But this formulation fails to explain which court is the appropriate one or, again, who is to make that determination and whether it should be done by referring to habeas doctrine or the purposes of the statute. Indeed, respondent's rule cannot by itself answer even the most basic inquiries, such as whether a document has been delivered to the appropriate court if the court receiving the document has no jurisdiction to review the claim, if the proceeding in question does not "lie" in that court, or if statutory law simply precludes its adjudication on the merits.[1]

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[1] Respondent's reference to the "right time" is also far from self-explanatory, particularly given the interpretation he eventually places on it. Respondent appears to conclude that a petition is filed at the "right time" even if it is filed outside the expiration of a set statutory time limit so long as the statute setting the limit contains an "exception." *See* Resp. Bf. 38-39; *see also Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). Indeed, such a belated petition is filed at the "right time" even though the state prisoner has concededly filed outside the expiration of the period and has made no attempt whatsoever to invoke the statutory exception. Moreover, if the language in the statute requires interpretation, such as with regard to when the clock begins to run, then the state time-bar would be given no effect. Respondent does not indicate how "properly filed" or his conclusory "right time" formulation mandates these distinctions.

Nor is it true, as respondent seems to suggest, that simple reference to the states' rules is sufficient to resolve the many questions raised by respondent's own formulation. The New York rules cited by respondent do not come close to answering these queries. *See* Resp. Bf. at 17, 23-24. Section 304 of the New York Civil Practice Law and Rules does not answer whether the "correct document" has been delivered or what is the appropriate court or clerk for the filing of a particular document. Moreover, the statute demands the "delivery of a summons with notice, summons and complaint, notice of petition, or order to show cause," something that criminal defendants are simply not required to do in filing an ordinary post-conviction application. Thus, if anything, this rule affirmatively misleads state prisoners. Similarly, section 202.5 of the Uniform Rules for the New York State Trial Courts and the County Court cases from 1932 and 1898, to which respondent cites, say nothing about the nature of the "papers" to which they refer or what is the "appropriate courtroom" or the "official" in question.

These references neither answer the questions that must be answered, according to respondent's own interpretation, nor are "clear," "eas[y] of application," or "accessible and understandable to all litigants," as respondent asserts. Resp. Bf. at 19. There is, indeed, simply no method to decide these issues under respondent's formulation except on an ad hoc basis, because respondent refuses to link his definition to the purposes of the statute. These ad hoc decisions, untethered to any guiding principle, would simply spawn new litigation and create a new area of law concerning the application of "properly filed" in its many varied contexts. By contrast, all of these questions can be answered with relative ease if the statutory purpose of exhaustion is used for guidance. Petitions that advance exhaustion toll the statute, those that cannot advance exhaustion because they cannot be adjudicated on the merits do not.

Simple reference to established doctrines can resolve the relevant questions in virtually all cases.

Nor does respondent's reference to the word "application" resolve the unanswered questions that respondent's formulation identifies. The term sheds no light whatsoever on what the "correct document" is in a given case, who makes that determination, or how it is made. Nor does it provide any guidance concerning whether the document has been filed in the appropriate court. Moreover, while respondent insists that "application" clarifies the statute and he faults the state for failing to distinguish "application" from "claim," neither Congress in enacting AEDPA nor this Court in its opinions has been nearly as uniform in its usage as respondent asserts. Indeed, in the very same sentence in which "application" appears, Congress makes a non-specific reference to the "pertinent . . . claim" without stating how it relates to the "application." Furthermore, in the immediately preceding provision, Congress refers to the timeliness of the "application," but then lists several dates of commencement of the limitations period that are claim-specific, such as the date on which the factual basis for "the claim or claims" could have been discovered and the date on which the constitutional right asserted was initially recognized by this Court. *See* 28 U.S.C. sec. 2244(d)(1). And this Court has frequently used the word filed in connection with "claim" rather than with "application," although respondent insists that the clear definition of these two terms demands otherwise. *See McCleskey v. Zant*, 499 U.S. 467, 500 (1991) (petitioner "filed the *Massiah* claim"); *Davis v. Wainwright*, 478 U.S. 1044, 1045 (1986) (petitioner's "claim should have been filed in a Florida trial court . . . ."); *see also Lindh v. Murphy*, 521 U.S. 320, 340 (1997) (Rehnquist, C.J., dissenting) ("habeas claims must be filed first in state courts . . ."). Thus, the word "application" is insufficient by itself to supply answers to the many questions that respondent's definition of "properly filed" raises about those terms.

Moreover, contrary to respondent's contention, an application cannot be so easily separated from the claims in it. Even using respondent's interpretation of "properly filed," reference to the nature of the allegations and claims in the application is necessary to determine if the "correct document" has been filed in the "appropriate court."[2] The question is not whether such a review will occur, but rather which procedural rules will be used when the review takes place and whether the method of choosing those rules is faithful to the purposes of the tolling provision.

Thus, respondent's attempt at a plain-language analysis does not bring him or the Court any closer to an understanding of Congress's intent in using the term "properly filed." Moreover, his analysis does not support his conclusion that Congress intended that a state post-conviction petition that is filed in a court that cannot, under state law, hear or adjudicate the merits of any of his claims would be "properly filed" in that court.

Indeed, the statutory language and objectives compel the opposite conclusion. First, the language of the statute requires something more than mere filing, and respondent himself concedes that this added inquiry requires an examination of both the document itself and whether the document is filed in the "appropriate court." But a procedurally barred application that is filed in a court that cannot adjudicate the merits of the claims

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[2] For example, in New York, under decisional law, the only remaining usage of the writ of *coram nobis* is to raise a claim of ineffective appellate counsel in an intermediate appellate court, and a *coram nobis* petition in that court is the only method of raising such a claim. *See People v. Bachert*, 69 N.Y.2d 593, 516 N.Y.S.2d 623 (1987). But it is impossible to determine if a particular delivered document complies with this rule without examining the claim raised, as well as the court in which the document is filed.

and cannot grant relief to the defendant cannot be deemed to be filed in the "appropriate court."

As an example, New York, like many states, precludes a trial court from considering a claim that was previously decided on appeal for the obvious reason that a trial court cannot logically have the power to overrule an appellate court. *See* N.Y.C.P.L. §440.10(2)(a). A trial court, then, has no power to adjudicate the merits of a such a contention; the only court that could do so would be the appellate court in a motion to reargue, subject to that court's rules. A petition that attempts to raise such a claim in the trial court has, very simply, addressed his claim to the wrong court: a court that does not have the power to grant him the relief that he seeks.

Second, the only interpretation of "properly filed" that is consistent with the statutory scheme and objectives is one that gives full effect to state procedural rules. Such an interpretation advances the purpose of the tolling provision to allow for exhaustion of state remedies but does not countenance delays from repetitious, procedurally barred motions. *See infra* at 8-12; Pet. Bf. at 22-25.

Finally, respondent's attempt to preclude the court from considering the statutory objectives falls under the weight of respondent's own arguments. His claim that the plain language of the statute is so clear and unambiguous that resort to any inquiry beyond the statute is prohibited is belied by, if nothing else, his need to resort to such vague terms as "correct document" and "appropriate court." And the fact that his own definition renders meaningless at least one key word of the statute and is inconsistent with Congress's usage of the word "filed" elsewhere is still more evidence that reference to the statutory objectives cannot be avoided. Indeed, it is only by keeping in mind the purpose of the tolling provision that this

Court can provide content to the terms of the statute and the terms that respondent himself uses.

B. Respondent's Interpretation Frustrates the Objectives of the Statutory Limitations Period Without Advancing Any Purpose of the Tolling Provision.

Respondent argues that there is no reason to fear that capital prisoners will in fact delay under the statute, despite being given the opportunity to do so, and he similarly assures the court that non-capital prisoners have no incentive to delay and that there is thus no reason to believe that they will engage in such delay through repetitious litigation. Resp. Bf. at 17. These arguments need not long detain the Court.

Both this Court and Congress have recognized that capital prisoners have the greatest possible incentive to delay, and that most of these prisoners will use every means available to attempt to slow the process and frustrate the imposition of sentence. This Court has expressly observed that habeas petitioners frequently "delay their filings until the last minute" with a view to obtaining a stay, *see Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992), and has voiced concern that the procedures it has created have been used manipulatively in obvious attempts to delay executions indefinitely. *See Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983); *Gomez v. District Court*, 503 U.S. 653, 653-54 (1992). Congress too has recognized capital prisoners' undeniable incentive to delay and their limitless efforts to achieve that delay; indeed, it was these manipulative attempts that caused Congress to impose the statute of limitations in the first place. *See* 141 Cong. Rec. S 7822 (1995) (Sen. Nickles) (capital prisoners "fully exploit[] the system's potential for obstruction" and maximize delay); 141 Cong. Rec. S 7807 (1995) (Sen. Hatch) ("Abuse of the habeas process features strongly in the extraordinary delay between sentence and the carrying out of that sentence."); *see also* Report of the

Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of the United States, at 5 (1989). Congress in fact felt that by filing repetitive petitions, "criminals are able to delay the imposition of sentence indefinitely," resulting in "de facto nullification" of capital punishment. 141 Cong. Rec. S 7822, 7823 (1995) (Sen. Nickles).

Despite this, respondent now asserts that there is no evidence that capital prisoners in fact delay and that the court need not fear that capital prisoners will act to defeat the statute. In essence, he simply asserts that the very premise of the statute is incorrect, and that the court need not be concerned with it. But respondent cannot assume away the very reason that capital defendants were subjected to the statute of limitations in the first place, and his self-serving attempts to reassure the Court simply cannot command greater authority than Congress's concerns. Indeed, the only way to ensure that the statute has an effect in capital cases is to deny capital defendants the readily available tool for delay that respondent's interpretation of the tolling provision would provide.

Respondent, however, argues that there are ample other means available to the states of limiting delay in capital cases, such as simply setting an execution date. Resp. Bf. at 17. But these methods of limiting delay have always existed, yet they were wholly insufficient to contain the rampant delays that Congress was so concerned about. Indeed, Congress felt the need to impose a limitations period despite the existence of these alternative methods of controlling delays, and obviously intended the statute to have some effect beyond what these controls could accomplish.

Respondent similarly errs in his efforts to assure the Court that it should not be concerned with delays by non-capital prisoners, who, he argues, have no incentive to delay. Here again, there is no question that Congress was concerned about

delay by non-capital prisoners as well as capital prisoners, and the alleged lack of incentive to delay on the part of non-capital prisoners did not prevent Congress from imposing a statute of limitations that included them. Moreover, there is strong empirical evidence, cited in the state's main brief and not refuted by respondent, that state prisoners do cause delay by filing repetitious state motions. *See* Pet. Bf. at 37. Indeed, the evidence suggests that fifty percent of all state post-conviction petitions represents the prisoner's third or subsequent petition, and that a third of all such petitions represents the prisoner's fourth or subsequent petition. *See* Victor E. Flango, *Habeas Corpus in State and Federal Courts*, National Center for State Courts, at 37 (1994). And even a cursory review of cases in which the question of tolling has arisen reveals that repetitive state petitions are common and cause substantial periods of delay that serve no purpose.[3] Thus, whatever the motivation of non-capital prisoners, the fact is that they frequently file repetitious procedurally barred applications in state court that cause years of delay and serve no purpose under the statute. Under respondent's interpretation, these repetitious applications would pointlessly extend the limitation period for years.

Moreover, the problem of delay due to repetitious filings by non-capital prisoners cannot be controlled, as defendant suggests, by individual sanctions for abusive filers. To the contrary, the extent of the problem goes far beyond such remedies, which are imposed on a case-by-case basis and usually reserved only for the most vexatious litigants. These

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[3] *See Childs v. Zavaras*, 2000 U.S. App. LEXIS 2685 (10th Cir. 2000) (third state post-conviction motion); *Smith v. Johnson*, 216 F.3d 521 (5th Cir. 2000) (third state habeas petition); *Weekly v. Moore*, 204 F.3d 1083 (11th Cir. 2000) (third state motion filed); *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000) (three state post-conviction motions and one state habeas); *Dictado v. Ducharme*, 189 F.3d 889 (9th Cir. 1999) (fourth personal restraint petition); *Hughes v. Irvin*, 967 F.Supp. 775 (E.D.N.Y. 1997) (seventh out of ten post-conviction applications at issue).

measures cannot effectively address one-half or more of all state post-conviction applications.

In the end, respondent does little more than assure the Court that Congress's concerns in enacting the statute were unfounded or exaggerated. This Court should not adopt an approach that denies the very reason for Congress's enactment of a statute of limitations.

C. The State's Rule Employs Pre-existing Habeas Doctrine, Which Provides Ample Guidance on How the Rule Is To Be Administered.

Respondent argues that a rule that precludes tolling for state petitions that cannot be adjudicated on the merits is unworkable and would lead to "chaos" because it would raise too many unanswered questions and would require the creation of a new body of law. Resp. Bf. at 32-37. This is simply incorrect. The rule relies on well-established habeas corpus doctrines of procedural default to provide guidance to courts applying it, and, indeed, federal courts can readily rely on their own precedent with regard to specific state procedural rules to assist in the determination. Respondent fails to explain how "chaos" will result from a rule that simply adopts a doctrine that has been in operation for so many years.

Under the rule espoused by the state, a federal court need only apply its own procedural default precedent in order to determine whether a claim is procedurally barred or can be adjudicated on the merits in state court. Indeed, federal courts determine on a daily basis whether a claim raised in a federal petition that has not been raised in state court should be returned to state court for exhaustion purposes or whether the claim is procedurally barred under state law. Federal courts in New York make precisely this determination all the time, with regard to the very procedural rules at issue in this case, as many

Second Circuit and District Court cases demonstrate.[4] Because federal courts in fact easily make these procedural determinations even without a prior state-court ruling on the procedural question, they could also undoubtedly do so after a state court has decided the application. Indeed, in the ordinary case, the federal courts will have readily available to them a state-court determination eliminating any doubt as to the application of the state bar; all the federal court need do is give deference to that determination.

Respondent nevertheless appears to argue that the state's rule is unworkable because its formulation is overly generous to petitioners. He cites language in the state's brief that a state prisoner who "arguably" invokes an exception to the state rule of procedure would probably not be precluded from tolling, and he argues that all petitioners "arguably" invoke such exceptions. Resp. Bf. at 33-34. There are many answers to these assertions. First, the state's use of the term arguably, taken in context, is not a description of the standard to be used, as respondent suggests; it is merely a conclusion as to the actual

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[4] *See, e.g., Strogov v. Attorney General*, 191 F.3d 188, 193-94 (2d Cir. 1998); *Jackson v. Leonardo*, 162 F.3d 81, 84 and n.7 (2d Cir. 1998); *Reyes v. Keane*, 118 F.3d 136, 139-40 (2d Cir.1997); *Caballero v. Keane*, 42 F.3d 738, 740-41 (2d Cir. 1994); *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994); *Washington v. James*, 996 F.2d 1442, 1446-47 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991); *Johnson v. State of New York*, 974 F.Supp. 185, 188 n. 1 (E.D.N.Y. 1997); *Mabrey v. Keane*, 939 F.Supp. 193, 199 n.5 (E.D.N.Y. 1996); *Moates v. Walker*, 929 F.Supp. 82, 86 (E.D.N.Y. 1996); *Ball v. Senkowski*, 906 F. Supp. 99, 102 (N.D.N.Y. 1995); *Meachem v. Keane*, 899 F.Supp. 1130, 1138 (S.D.N.Y. 1995); *Perfetto v. Hoke*, 898 F.Supp. 105, 110-11 (E.D.N.Y. 1995); *Meatley v. Artuz*, 886 F.Supp. 1009, 1013 (E.D.N.Y. 1995); *Bacchi v. Senkowski*, 884 F.Supp. 724, 731 (E.D.N.Y. 1995), *aff'd*, 100 F.3d 603 (2d Cir.), *cert. denied*, 519 U.S. 894 (1996); *Bentley v. Scully*, 851 F.Supp. 586, 603 (S.D.N.Y. 1994), *vacated on other grounds*, 41 F.3d 818 (2d Cir. 1994), *cert. denied*, 516 U.S. 1152 (1996); *Holmes v. Bartlett*, 810 F.Supp. 550, 555-56 (S.D.N.Y. 1993).

effect of the rule. As the state's main brief makes clear, federal courts will decide the tolling issue by making precisely the same determination that they would make if they were deciding to return the case to the state courts for exhaustion purposes or deem the matter procedurally barred under a state rule. Federal courts make these determinations every day, and the rule stated is thus not "unworkable."[5]

Second, it is simply not true that most petitioners invoke, much less legitimately invoke, exceptions to state procedural rules. Indeed, with regard to the very state rule at issue in this case, federal courts in New York have routinely held that petitioner's claims would be procedurally barred without the need to discuss the invocation of any exception. This is true of almost all reported Second Circuit and New York District Court cases dealing with the rule at issue in this case.

Third, the rule is not unworkable simply because in some cases the federal courts may have to determine the applicability of an exception. This Court, in fact, dealt with just such a

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[5] Indeed, four of respondent's ten enumerated questions revolve around the use in the state's brief of the word "arguably" and its companion word "colorably," neither of which purports to state any standard of review. Three questions relate to whether tolling should occur on a claim-by-claim basis, but there has never even been any suggestion by the state that tolling need occur in this manner and thus these too need not concern the Court. One question relates to the use of the word "mandatory" in the state's brief, which was simply intended to distinguish between New York's post-conviction procedural rules that are wholly discretionary, *see* N.Y.C.P.L. § 440.10(3), and its non-discretionary bars, such as the ones that apply in this case, *see* §440.10(2). And, finally, respondent's question concerning the need for a cause-and-prejudice rule is obviated by Congress's inclusion in the statute of limitations of several provisions delaying commencement of the one-year period where a petitioner would otherwise have cause, such as when an external impediment to filing exists, there is a retroactively effective change in the law, or the factual basis of the petitioner's claim could not have been discovered earlier. *See* §2244(d)(1)(B),(C), and (D).

situation in *Teague v. Lane*, 489 U.S. 288, 297-99 (1989). There, the Court considered an Illinois procedural rule that precluded re-litigation of claims that were or could have been raised on direct appeal. The rule, however, contained an exception for claims of fundamental unfairness. The Court held that, although the petitioner's equal protection claim had not been raised in state court, it was procedurally barred under state law and would not be returned to state court for exhaustion purposes. The Court specifically held that the fundamental fairness exception did not apply to petitioner's equal protection claim under state law, based on pre-existing state precedent. *See also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). Thus, as experience has demonstrated, the exceptions to state procedural rules are not so elusive as a practical matter as to have made the procedural default doctrine unworkable.

Fourth, this Court need not, of course, be so lenient to petitioners as to adopt the state's rule in toto; it could, instead, simply accept a prior state-court determination on a procedural rule as the final word, as have some federal courts, *see Freeman v. Page*, 208 F.3d 572, 576-77 (7th Cir. 2000); *Webster v. Moore*, 199 F. 3d 1256, 1259 (11th Cir. 2000), and make no express provision for those petitioners who legitimately believe that they are exhausting state remedies in state court. Or, it could simply rely on principles of equitable tolling to handle such situations. *See Smith v. McGinniss*, 208 F.3d 13 (2d Cir. 2000) (collecting cases). These approaches too provide viable alternatives that give effect to state procedural rules and prevent capital prisoners from defeating the statute and non-capital prisoners from benefiting from pointless motions that do not advance the purposes of exhaustion.

Respondent also advances two arguments that the state addresses in its main brief. He argues that the rule places an unreasonable burden on petitioners and that petitioners will accordingly flock to federal court, overburdening the system.

Resp. Bf. at 12-13, 34. But petitioners are already charged with knowledge of state procedural rules under the procedural default doctrine. *See McCleskey v. Zant*, 499 U.S. at 493 (procedural default and abuse of the writ doctrines "impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones"). The rule here requires no more. *See* Pet. Bf. at 32. Moreover, there is no evidence of mass, premature flight to federal court in those circuits in which tolling is disallowed for state petitions that are procedurally barred. Nor is there any indication that the established procedures for dismissing petitions with unexhausted claims have become so unworkable as to be inadequate to handle the problem, should one arise.

In short, respondent's arguments that the state's rule is unworkable simply ignore the fact that the rule adopts well-established doctrines that have been routinely applied in the federal courts. Thus, his grave predictions are unfounded.

D. Respondent's Second Post-Conviction Motion Was Procedurally Barred in State Court.

Respondent now argues that his second post-conviction 440 motion was not in fact procedurally barred in state court. He contends that because the procedural rules prohibiting review of his claims contained exceptions or other qualifying language, his claims were not mandatorily barred and he should be afforded tolling, even though he never invoked the statutory exceptions at issue. In so arguing, however, respondent asks this Court to adopt a new and quite unprecedented habeas rule that denies respect for state procedural statutes if they contain any exception whatsoever, as broadly defined by respondent. The Court should decline to create this new distinction.

Under section 440.10(2)(a) of the New York Criminal Procedure Law, a court "must" dismiss a claim that was previously decided on the merits on direct appeal. Respondent points out that that section contains an exception for claims that rely on "a retroactively effective change in the law." He does not dispute that his first claim in the 440 motion was previously decided on the merits; nor did he invoke the exception in his 440 motion, or make any attempt to show even now that there was a retroactively effective change in the law from which he could have benefited. According to respondent, because of the mere existence of this uninvoked exception, the procedural bar is not mandatory.

Respondent essentially repeats this argument as to the other mandatory bar applicable to his 440 motion, section 440.10(2)(c). Under that provision, a court "must" dismiss a claim that could have been raised on direct appeal but was not, such as respondent's second and third claims in his 440 motion. Respondent observes that this statute contains language that the failure to raise the claim must be unjustifiable and that the record on direct appeal must have been "adequate." Here again, respondent does not contend that he argued in his 440 motion that his failure was justifiable or that the record on direct appeal was not adequate to raise his claims; nor does he make those arguments now. According to respondent, his claims are not mandatorily barred from review because of the mere existence of these uninvoked exceptions.

But the distinction respondent creates is entirely new to this Court's habeas corpus jurisprudence and would violate fundamental principles of comity and federalism by denying respect for the vast majority of state procedural rules. No such distinction is made under the doctrine of procedural default, and as this Court's decision in *Teague v. Lane* establishes, the mere existence of an exception to a state procedural rule, even an exception as broad as "fundamental unfairness," does not

preclude a federal court from applying it, even without a prior adjudication in state court on the issue. *See Teague*, 489 U.S. at 297-99. Moreover, most state rules contain either some exception, or at the least some qualifying language the existence of which would operate to deny the rule respect under the tolling provision. This would not only disserve core principles of comity and federalism that AEDPA sought to advance, *see Williams v. Taylor*, 120 S.Ct. at 1490, it would allow prisoners in almost all states to file repetitive applications and defeat the statute of limitations at will.

Furthermore, respondent fails to address why this Court would need a state-court decision to conclude that his claims are procedurally barred when he does not currently dispute that the facts required under the statute for application of the bars have been established. Indeed, he makes no argument or showing that the procedural bars were inapplicable other than to point to exceptions that he never previously invoked and still does not rely on. This extraordinary fact alone should preclude respondent from asserting that the procedural bar is inapplicable. Regardless of whether an explicit state-court decision applying the procedural bar should be required in the ordinary case, respondent's concessions here obviate the need for one.

Additionally, the mere fact that the state made alternative procedural and even merits arguments does not deprive the procedural bar of its effect. Just as a state court need not fear, under the procedural default doctrine, treating the merits in the alternative, *see Harris v. Reed*, 489 U.S. 255 (1989), a representative of the state does not deprive an otherwise applicable procedural rule of its effect simply by making an alternative argument. This is particularly true in this case, where respondent makes no argument that the procedural bar was inapplicable, other than to identify uninvoked exceptions.

Nor does the fact that respondent made a passing reference in his motion to his belief that he was exhausting state remedies save his clearly barred petition. Petitioner's subjective view cannot control the application of the tolling provision. Indeed, if it could, petitioners could routinely avoid the tolling provision simply by placing such a statement of good faith in their state-court applications. Similarly, contrary to respondent's contention (Resp. Bf. at 38 n.18), this subjective belief does not, by itself, constitute a legitimate attempt or even "arguably" legitimate attempt to exhaust state remedies, given that his claim is clearly procedurally barred, as respondent has effectively conceded.

In short, even under respondent's own formulation, he failed to file the "correct document" in the "appropriate court" or, for that matter, at the "right time." He filed a motion for post-conviction relief in the trial court when the only court that could hear or adjudicate his claims on the merits was the Appellate Division on direct review in 1986, and he filed his motion years after that court's review was completed. This motion did nothing to advance the purpose of the tolling provision to allow for exhaustion, and served no purpose other than delay.

* * * *

In the end, respondent's interpretation of the tolling provision is untenable, primarily because it is divorced from the statute's purposes. His attempts to define the statutory language rely on meaningless terms, which can only be given content by reference to the statutory aims. Moreover, his overly simplistic interpretation allows tolling for repetitious state petitions that cannot advance any purpose of the statute but instead actively undermine it. And, perhaps most important, respondent's interpretation provides capital prisoners with a

simple expedient to defeat the statute and perpetuate the very delays that caused Congress to pass the statute in the first place.

Respectfully submitted,

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No. 99-1238

In the

Supreme Court of the United States

CHRISTOPHER ARTUZ,

Petitioner,

v.

TONY BRUCE BENNETT,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF THE STATES OF FLORIDA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, ILLINOIS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a state court post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions, if the state court's procedural rules bar it from reaching the merits of the application?

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INTEREST OF THE AMICI CURIAE

Federal habeas corpus proceedings, by their very nature, involve second-guessing the state judicial process and delaying the date on which state judgments truly become final. Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 in response to concerns expressed by the Amici States and others that state court judgments were being treated with too little respect and that the habeas corpus process was taking far too long. This case addresses one of the measures enacted by Congress to tackle the latter concern, 28 U.S.C. § 2244(d). The one-year statute of limitations for filing habeas corpus petitions in federal courts established by § 2244(d) is a major innovation that could reduce by years the delays in executing state court judgments. The efficacy of the new limitations period will be destroyed, however, if the tolling provision set forth in § 2244(d)(2) is improperly interpreted. The Amici States have an abiding interest in ending undue delays in the habeas corpus process and in ensuring that the new limitations and tolling provisions are construed in accordance with Congress' intent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) broke new ground in federal habeas corpus law by imposing a statute of limitations for filing habeas corpus petitions. Under 28 U.S.C. § 2244(d)(1), "a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." The new law further provides, however, that the "time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2) (emphasis added). At issue in this case is the meaning of the term "property filed."

Under New York State law, a claim that had been previously determined on the merits on direct review is mandatorily barred from review under New York's post-conviction review procedure, set forth in New York Criminal Procedure Law (CPL) § 440.10. New York law likewise bars post-conviction review of a claim that could have been addressed on direct review had it been raised. *Id.* § 440.10(2). Respondent Bennett filed a post-conviction application that the State contends is procedurally barred for those very reasons. In the decision below, the Second Circuit held that, even if that is so, respondent's post-conviction application was "properly filed" and therefore tolled AEDPA's one-year limitations period. Pet. App. 14a-17a. More generally, the Second Circuit found the term "properly filed" to "mean simply that an application for state post-conviction relief recognized as such under governing state procedures has been filed." *Id.* 17a. That construction of the AEDPA's tolling provision is seriously flawed and should

be rejected by this Court. The better reading of § 2244(d)(2) is that a "properly filed" application is one that was raised correctly pursuant to state procedures, thereby permitting state courts to rule on the merits of the application.

A. The construction of § 2244(d)(2) advocated herein by the Amici States is – in contrast to the Second Circuit's construction – consistent with the plain and ordinary meaning of the word "properly." "Proper" is defined as meaning "strictly accurate" and "correct," suggesting that a "proper" or "properly filed" application is one that correctly complies with all of a State's procedural rules. The Second Circuit therefore errs in deeming as "properly filed" an application that was in no way procedurally "accurate" or "correct." Moreover, the types of procedural rules which the Second Circuit approach ignores for purposes of interpreting § 2244(d) are rules this Court has repeatedly found to be very significant to the state judicial process.

This Court's longstanding use of the words "proper" and "properly" in habeas corpus cases is consistent with the Amici State's construction of § 2244(d)(2). Numerous pre-AEDPA decisions of the Court used the words to denote compliance by a prisoner with all of the state procedural rules necessary for the state courts to reach the merits of the prisoner's claims. The Congress that enacted AEDPA can be presumed to have been familiar with those cases. And the decisions of this Court post-AEDPA – in particular, *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) – powerfully confirm the terms' settled meaning.

B. The Second Circuit's interpretation of the term "properly filed" is also flatly inconsistent with the plain objectives of the newly-minted limitations period. The goal of the one-year

statute of limitations is to expedite the habeas corpus process and to end abusive delays and late filings. Yet the Second Circuit rule would permit prisoners to delay the running of the petition by filing frivolous, obviously improper state post-conviction applications. Indeed, the Second Circuit rule would permit prisoners to file, in bad faith, repeated applications for such review and thereby toll the limitations period indefinitely. Congress surely did not intend that the limitations period be utterly ineffective in most States until the States amend their post-conviction review processes to eliminate a tolling loophole.

Nor does the Second Circuit rule advance the objective of permitting prisoners to exhaust their state court remedies. It is textbook habeas corpus law that a procedurally improper filing such as respondent Bennett's does not exhaust state remedies. Similarly, second or successive applications that are procedurally rejected because they fail to raise new facts or law do not exhaust state remedies.

C. The doctrine of comity is advanced by a construction of "properly filed" under which federal courts look to state procedural rules to determine whether applications were filed "properly." Comity is also furthered by expediting the habeas corpus process – an objective undermined by the Second Circuit rule. It is true that, under the position advocated by the Amici States, federal courts will have to interpret state procedural rules. But federal courts already do that every time they are called upon to find a prisoner's claim unexhausted or procedurally barred. Finally, district courts are well-equipped to handle protective filings submitted by prisoners who in good faith have also filed second or successive state applications.

ARGUMENT

AN APPLICATION FOR STATE POST-CONVICTION RELIEF THAT IS BARRED BY THE STATE'S PROCEDURAL RULES IS NOT A "PROPERLY FILED" APPLICATION THAT TOLLS THE ONE-YEAR LIMITATIONS PERIOD ON FILING HABEAS CORPUS PETITIONS

The tolling provision of 28 U.S.C. § 2244(d)(2) reflects Congress' intent to ensure that state inmates first exhaust their claims in state court before filing habeas corpus petitions in federal court. In the run-of-the-mill case, the dual interests reflected in § 2244(d) – resolving inmates' claims expeditiously and respecting state tribunals – are satisfied without controversy. When a prisoner satisfies all of a State's procedural rules governing post-conviction relief, and the state courts deny relief through an opinion that reaches the merits of the claims, § 2244(d) is easily applied. The inmate's application was unquestionably "properly filed"; he then has one year from the date the state courts finally denied the application to file a habeas corpus petition in federal court (minus the time that elapsed between the end of direct review and the filing of his state post-conviction application).

Application of the tolling provision has engendered dispute when inmates' applications failed to comply with the States' procedural rules governing post-conviction relief. The Second Circuit, and several other lower courts, have ruled that an application for state post-conviction relief can be "properly filed" even if it is dismissed on the ground that it failed to meet a State's procedural rules. The Second Circuit stated that the words "properly filed" "mean simply that an application for

state post-conviction relief recognized as such under governing state procedures has been filed." Pet. App. 17a. More concretely, the court held that a "properly filed" application is any application that seeks post-conviction relief on its face and is filed in accordance with "the rules governing notice and the time and place of filing." Pet. App. 14a (quoting *Villegas v. Johnson*, 184 F.3d 467, 469 (CA5 1999) (quoting *Lovasz v. Vaughn*, 134 F.3d 146, 148 (CA3 1998)). Thus, even an application for post-conviction relief that is obviously barred because it presents claims that are only cognizable on direct review would be deemed "properly filed." *See, e.g.*, Pet. App. 16a.[1]

An alternative interpretation is that an application for state post-conviction relief is "properly filed" only if it correctly meets all of the state's procedural requirements governing post-conviction relief. Put slightly differently, a claim that cannot be heard on the merits under state law because it is barred by a state procedural rule is not "properly filed." The Ninth Circuit adopted this approach in *Dictado v. Durchame*, 189 F.3d 889 (CA9 1999), where it held that a prisoner's fourth state application that had been dismissed as time-barred and successive by the state's highest court was not "properly filed."

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[1] The precise contours of this approach (referred to herein as the "Second Circuit rule") are not clear. The Fifth Circuit has held that even an untimely application for post-conviction review is "properly filed" if, in limited circumstances, the state court may excuse the tardiness. *Smith v. Ward*, No. 98-30444, 2000 WL 358294 (CA5 April 7, 2000). Yet the Fifth Circuit had earlier held that "properly filed" refers to little else besides "the rules governing notice and the time and place of filing." *Villegas*, 184 F.3d at 469 & n.2, *quoted in* Pet. App. 14a.

Analysis of the language of § 2244(d), the goals of the new limitations period and tolling provision, and the comity interests underlying AEDPA demonstrate that Congress intended the latter interpretation.

A. The Term "Properly Filed" Is Most Sensibly Read As Taking Into Account All State Rules That Preclude State Courts From Considering The Merits Of An Inmate's Claims

In determining whether a procedurally barred application can nevertheless be "properly filed" within the meaning of § 2244(d)(2), the starting point is "the language of the statute." *Williams v. Taylor*, No. 99-6615, slip op. 8 (April 18, 2000) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). The word "proper" connotes (in this context) being done correctly. *See, e.g., Merriam Webster Collegiate Dictionary* 935 (10th ed. 1995) (defining "proper" to mean "strictly accurate" or "correct"); *Black's Law Dictionary* 1216 (6th ed. 1990) (defining "proper" as "[t]hat which is fit, suitable, appropriate, adapted, correct"). An action is not ordinarily thought of as "proper" if it is done in conformity with some applicable rules, but in contravention of others. An application for post-conviction relief is only "properly filed" if it is raised correctly pursuant to state procedures, thereby permitting the state court to address the merits of the claim.

The procedural rules which the Second Circuit concluded are irrelevant to determinating whether applications are "properly filed" are rules this Court has found to be of paramount importance. In *Murray v. Carrier*, 477 U.S. 478, 490 (1986), the Court stated that "[a] State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack."

Quoting *Reed v. Ross*, 468 U.S. 1, 10 (1984), the Court elaborated on the "purposes served by the procedural rule . . . which" – like New York CPL § 440.10 – "required the defendant initially to raise his legal claims on appeal rather than on postconviction review:"

It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. . . . This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. (Citations omitted.)

This commonsense reading of the provision finds support in the "accumulated settled meaning[s]," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981), of the adjective "proper" and the adverb "properly." Numerous opinions of this Court in habeas corpus cases have used those words to indicate compliance not only with the barebones procedural rules covered by the Second Circuit's rule, but with various other procedural rules that would prevent a state or federal court from reaching the merits of a prisoner's application or petition. Many of those opinions were issued before Congress enacted AEDPA, and Congress presumably was aware of them. *See Molzof v. United States*, 502 U.S. 301, 307 (1992) (quoting *Morrisette v. United States*, 453 U.S. 322, 329 (1981)). Others were issued after AEDPA's enactment and confirm the settled meanings. The list below is a sampling of those decisions (in each case with the words "proper" or "properly" placed in bold):

- *Wainwright v. Witt*, 469 U.S. 412, 431 n.11 (1985): "Under circumstances where the state courts do not rely on independent state grounds for disposing of a claim and instead reach the merits of a federal question, the federal question is **properly** before us."

- *Reed v. Ross*, 468 U.S. 1, 11 (1986): "To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not **properly** raised before the state court, these legitimate state interests [requiring that issues be resolved shortly after trial on appeal, not postconviction review] may be frustrated . . . ."

- *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986): "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition. Our decision today concerns the circumstances under which district courts **properly** should entertain the merits of such a petition." (Citation omitted.)

- *Harris v. Reed*, 489 U.S. 255, 265 (1989): "The 'plain statement' requirement achieves the important objective of permitting the federal court rapidly to identify whether federal issues are **properly** presented before it."

- *Harris v. Reed*, 489 U.S. 255, 268 (1989) (O'Connor, J., concurring): "I do not read the Court's opinion as addressing or altering the well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been **properly** exhausted in the state courts."

- *McCleskey v. Zant*, 499 U.S. 467, 479 (1991): "With the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court, the writ today appears to extend to all dispositive constitutional claims presented in a **proper** procedural manner."

- *Coleman v. Thompson*, 501 U.S. 722, 767 (1990) (Blackmun, J., dissenting): Justice O'Connor's concurring opinion in *Harris v. Reed* "emphasize[d] that the Court's opinion did not alter the well-settled rule that federal courts may look to state procedural-default rules in determining whether a federal claim has been **properly** exhausted in the state courts."

- *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992): "In light of these decisions, it is similarly irrational to distinguish between failing to **properly** assert a federal claim in state court and failing in state court to **properly** develop such a claim . . . ."

- *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting): "To be sure, habeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is **properly** presented to the district court."

- *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (Blackmun, J., dissenting): "Even as the Court has erected unprecedented and unwarranted barriers to the federal judiciary's review of the merits of claims that state prisoners failed **properly** to present to the state courts . . . ."

- *Reed v. Farley*, 512 U.S. 339, 354 (1994): "Where the petitioner – whether a state or federal prisoner – failed **properly** to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows" prejudice.

- *Breard v. Greene*, 523 U.S. 371, 377 (1998): "Even were Breard's Vienna Convention claim **properly** raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."

The recent decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), strongly supports the proposition that a "proper" post-conviction application is one that complies with all of a state's procedural rules and therefore is decided on its merits by the state courts. In *Boerckel*, the Court and the dissent addressed the interplay between exhaustion and procedural default. The Court stated that, to avoid allowing prisoners to evade the exhaustion requirement, it "ask[s] not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." 526 U.S. at 848 (emphasis in original). The Court was echoing language in Justice Stevens' dissent: "A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims]." *Id.* at 854 (emphasis in original) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). A State does not have a "fair opportunity to pass upon an inmate's claims" if the inmate breaches a procedural rule and thereby prevents the state court from reaching the merits of his claims.

In *Edwards v. Carpenter*, No. 98-2060 (April 25, 2000), the Court applied *Boerckel*'s reasoning to the question whether the exhaustion requirement of *Murray v. Carrier*, *supra*, is subject to the procedural default rule. *Murray* required that, for a claim of ineffective assistance of counsel to serve as cause for the procedural default of some other constitutional claim, the ineffective-assistance claim first had to be raised in state court. 477 U.S. at 489. *Edwards* extended *Murray* by holding that mere presentation in state court was not enough – the claim had to be presented "in such a manner that the state court could . . ., consistent with its own procedural rules, have entertained it." *Edwards*, slip op. 6. In the terminology of *Boerckel*, the claim had to be "properly" presented. Respondent Bennett's application for post-conviction relief would not meet that test.[2]

B. The Second Circuit's Interpretation of the Term "Properly Filed" Undermines the Objectives of the Limitations Period and Fails to Advance the Objectives of the Tolling Provision

Assuming, *arguendo*, that the term "properly filed" is ambiguous, its meaning should be resolved by analyzing the policies underlying the limitations period and tolling provision.

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[2] Although the term "properly filed" is occasionally used in other contexts, it does not appear to be a legal term of art. The term has been used to describe proofs of claim filed in bankruptcy, tariffs filed under § 203(a) of the Communications Act of 1934, unfair labor practice claims instituted under the National Labor Relations Act, and notices of appeal generally. None of those *ad hoc* usages of the term indicates that an application, petition or claim of any sort can be "properly filed" even though the submission violates applicable procedural rules.

See Rose v. Lundy, 455 U.S. 509, 517 (1982) (citing *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("'In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy'" (citations omitted)); *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ("where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose'" (citation omitted)). Such analysis confirms the failings of the Second Circuit rule.

1. The Second Circuit's Rule Would Undermine the Objective of the Limitations Period, Which is to Stop Abusive Delays and Late Filings

a. In enacting a limitations period for filing habeas corpus petitions, Congress responded to longstanding concerns about delays and last-minute filings in capital cases. The influential *Powell Report* recommended a limitations period for first habeas petitions, stating:

In death penalty jurisdictions, the sole incentive for a prisoner to initiate post-conviction review is either the scheduling of an execution date or the threat to schedule one. . . . It is clear that there must be a substitute mechanism to cause understandably reluctant state prisoners to seek post-conviction review when such action may remove the only obstacle preventing the State from carrying out the death sentence.[3]

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[3] U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 19 (1989) (commonly referred to as the "Powell Report" after the Chairman of the Committee, Justice Lewis Powell).

The negative consequences of such delays had been much remarked-upon, both by this Court and members of Congress. In *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982), the Court stated that it "must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." A decade letter, the problem of delay persisted: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653, 654 (1992) (*per curiam*).

These concerns prompted the introduction in Congress of more than 80 bills proposing a statute of limitations for habeas corpus petitions in the 10 years prior to AEDPA's enactment. *See Lonchar v. Thomas*, 517 U.S. 314, 333 (1996) (Appendix listing the bills). When Congress finally reformed the habeas corpus laws in 1996, combating delay was at the forefront. According to the conference report: "[t]his title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." House Conf. Rep. No. 104-518, at 111 (April 15, 1996), *reprinted in* 1996 U.S.C.C.A.N. 944. The new one-year limitations period for filing habeas corpus petitions is a key element of that reform effort.

b. The Second Circuit's rule treats as "properly filed" at least two categories of applications that run afoul of state

procedural rules: (1) applications such as respondent Bennett's, which raise claims that are not cognizable on post-conviction review, and (2) second or successive applications that, in contravention of state rules, do not raise new facts or new legal rules that apply retroactively. The consequence of treating the first category of procedurally improper applications as "properly filed" is to allow inmates to extend the limitations period – in bad faith – for the many months it may take the state courts to reject the application as procedurally improper. The consequence of treating the second category of procedurally improper applications as "properly filed" is even greater: it allows inmates to extend the limitations period indefinitely by filing repeated applications in bad faith that do not genuinely raise any new facts or law. In capital cases, prisoners would have every incentive to take that course. Regardless of the precise length of the delay, the result will be undermining the one-year limitations period established by Congress.

As long as a state places limits on the issues that can be raised on post-conviction review, or leaves a safety valve for the filing of second or successive applications, inmates can easily abuse the Second Circuit rule and toll the limitations period irrespective of whether the state courts ever reach the merits of their applications. The Second Circuit rule would thereby frustrate the objectives of the limitations period in most states. For example, the large majority of death penalty states find second or successive applications to be procedurally barred the vast majority of the time, but their courts will review them in rare instances. *See, e.g.*, California: *In re Harris*, 5 Cal. 4th 813, 855 P.2d 391 (1993); Fla. R. Crim. P. 3.850(f); 725 Ill. LCS 5/122-3 (as construed in *People v. Flores*, 606 N.E.2d 1078 (Ill. 1992)); Md. Code Ann., Art. 27, § 645A; Mo. S. Ct. R. 91; N.C. Gen. Stat. §15A-1419(a); 42 Pa. Cons. Stat.

§ 9545(b)(1); Tex. Code Crim. P. arts. 11.070(4), 11.071(5); Utah R. Civ. P. 65C; Wash. Rev. Code § 10.73.140.

It is no response to suggest, as respondent Bennett and the Second Circuit have, that these States can amend their statutes to create ironclad barriers to their state court judges even receiving second or successive applications for post-conviction relief. *See* Resp. Opp. 7; Pet. App. 17a (quoting *Villegas*, 184 F.3d at 472-73). Congress enacted AEDPA with a backdrop of 50 state laws governing post-conviction relief. There is no reason to believe Congress had the unspoken intent that, in order for its newly-minted limitations period to be effective, most States would have to amend their respective statutes.

Slack v. McDaniel, No. 98-6322 (April 26, 2000), is not the contrary. In *Slack,* the Court observed that States could "impose proper procedural bars" to solve the problem of prisoners filing repeated mixed petitions in federal court. Slip op. 12-13. *Slack* did not, however, involve the interpretation of a new provision of law that would be undermined absent amendments to state laws across the country. *See id.* at 9 (noting that the case involved pre-AEDPA law). It is one thing to point out that state legislatures have the ability to solve a problem; it is another thing altogether to interpret a federal statutory term in a manner that saps it of effect absent widespread state legislative action.

2. The Second Circuit's Rule Does Not Advance the Objective of the Tolling Provision, Which is to Permit Inmates to Exhaust Their State Remedies Prior to Filing Habeas Corpus Petitions

One of the animating principles of habeas corpus jurisprudence is that state courts should have the first opportunity to hear inmates' claims that their convictions should be overturned. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Ex parte Royall*, 117 U.S. 241, 251 (1886). In recognition of, and deference to, that principle Congress provided that "properly filed" applications for state relief would toll the one-year limitations period. This permits an inmate to exhaust his state avenues of relief without fear that the one-year limitations period for any future habeas corpus petition would expire. Had Congress not tolled the limitations period during the pendency of "properly filed" applications for state relief, many inmates would have been forced to file habeas corpus petitions while in the process of exhausting their state remedies.

The Second Circuit's interpretation of "properly filed" does not advance that objective. In respondent Bennett's case, for example, post-conviction review is mandatorily barred because his claims were, or could have been, raised on direct review. He cannot exhaust his claims by invoking a procedure – post-conviction review – that is simply unavailable to him. That is the very reason why other prisoners who made the same mistake as Bennett found their claims exhausted but procedurally barred. *See, e.g., Teague v. Lane*, 489 U.S. 288, 297 (1989); *Engle*, 456 U.S. at 125-26 n.28, 135.

The exhaustion doctrine is also not advanced when a second or successive state application that is rejected without any

review of the merits is deemed "properly filed." The exhaustion requirement is satisfied when state prisoners "give the state courts one full opportunity to resolve any constitutional issues by invoking *one complete round* of the State's established appellate review process." *Boerckel*, 526 U.S. at 845 (emphasis added). Second or successive applications that are rejected on procedural grounds – *e.g.*, because they do not genuinely raise new facts, new law or fundamental fairness – do not exhaust remedies any more than an application that is dismissed by the court clerk because it missed the filing deadline. *See Castille v. Peoples*, 489 U.S. 346, 350-51 (1989) (a claim is not "fairly presented" for exhaustion purposes "where the claim is presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor.'") (citation omitted).

C. The Doctrine of Comity Supports Construing the Term "Properly Filed" to Cover Only Applications that Comply With All State Procedural Rules

The doctrine of comity – of showing respect for state processes and the States' dignitary interests – supports the reading of "properly filed" advanced herein. As Judge Garza stated in his dissent in *Villegas, supra*, "if comity is a concern, then federal courts should look to state procedural filing requirements to ascertain whether a petition is filed properly." 184 F.3d at 476. When a State decides that certain claims may only be raised on direct review, or that second or successive applications not making certain showings are procedurally barred, comity is furthered when federal courts respect those choices. This is particularly so when the State makes clear that its rules are procedural by, for example, providing that when the

requisite showings are not made, the courts "will not consider the [application]" or "may not consider the merits" of the application. *See, e.g.*, Wash. Rev. Code § 10.73.140 (former quote); Tex. Code Crim. P. art. 11.071(5) (latter).

The States' comity interests are, of course, furthered by the exhaustion requirement and furthered to the extent the tolling provision of § 2244(d)(2) advances the exhaustion requirement. But, as noted above, the Second Circuit's unduly expansive reading of the term "properly filed" does not advance the exhaustion requirement. Prisoners who are legitimately seeking to exhaust their state remedies – by "invoking one complete round of the State's established appellate review process," *Boerckel*, 526 U.S. at 845 – may do so under the Amici States' reading of § 2244(d)(2) without fear that the one-year limitations period would expire during that time.

Moreover, the States also have a comity interest in expediting the habeas corpus process. This Court has observed that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, 456 U.S. at 128. *See also In re Blodgett*, 502 U.S. 236, 239 (1992) ("None of the reasons offered in the response dispels our concern that the State of Washington has sustained severe prejudice by the 2½-year stay of execution."). That comity interest would be significantly impaired by the Second Circuit's construction of "properly filed," which, as a practical matter, delays and even vitiates the one-year limitations period in many States.

Several lower federal courts have objected that federal courts should not make the determination whether a pending state

134 F.3d at 148-49. But federal courts make such judgments routinely in order to enforce the exhaustion and procedural bar requirements. As Justice O'Connor has observed, there is a "well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been properly exhausted in the state courts." *Harris*, 489 U.S. at 268 (O'Connor, J., concurring). Further, "federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court." *Id.* at 270. *See also Teague*, 489 U.S. at 297-98 (concluding that Illinois courts would not apply "fundamental fairness" exception to its rule preventing certain claims from being raised on collateral review).[4]

It remains only to respond to the argument that the construction of "properly filed" urged herein and adopted by the Ninth Circuit would create practical problems. Specifically, the question has been raised: what happens when a prisoner who has filed a second or successive state application simultaneously or shortly thereafter files a federal habeas corpus petition as a protective measure? *See Villegas*, 184 F.3d at 472; *Lovasz*, 134 F.3d at 148. The answer is simple. The State would then be put to the choice of arguing either that the claims have not been exhausted (which in certain circumstances

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[4] It bears emphasis that federal courts are not reviewing the merits of state applications when they engage in such inquiries. Rather, they are determining whether state procedures would permit state courts to reach the merits of the applications. *See Villegas*, 184 F.3d at 474 (Garza, J., dissenting) (responding to majority's view that Congress did not authorize federal courts to review the merits of successive state applications).

might bar the State from arguing procedural default in state court) or arguing that the claims were exhausted because there is no available state remedy. The federal court would then have to decide whether the state court application is, in fact, procedurally barred – a decision that, as noted, federal courts routinely make.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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